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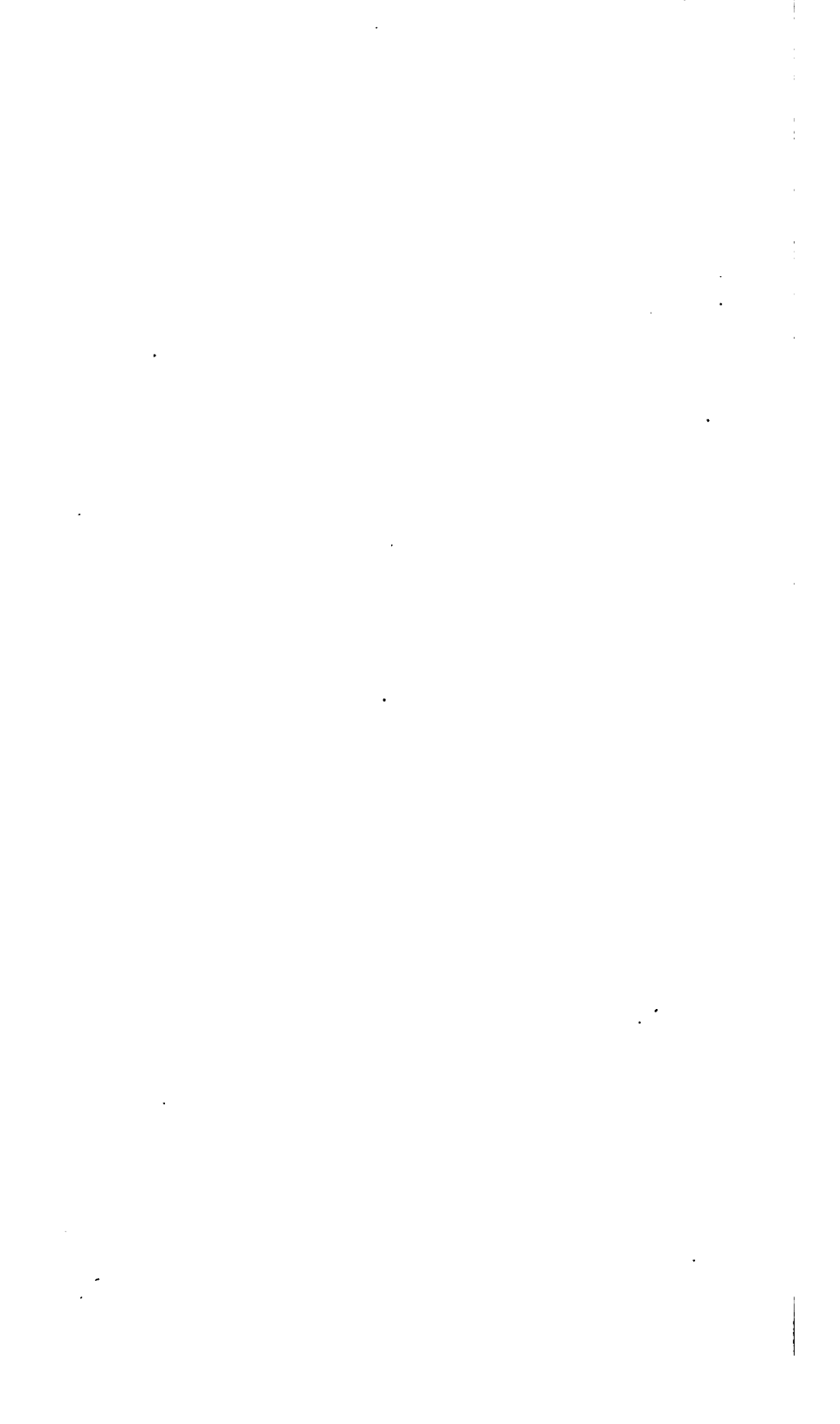
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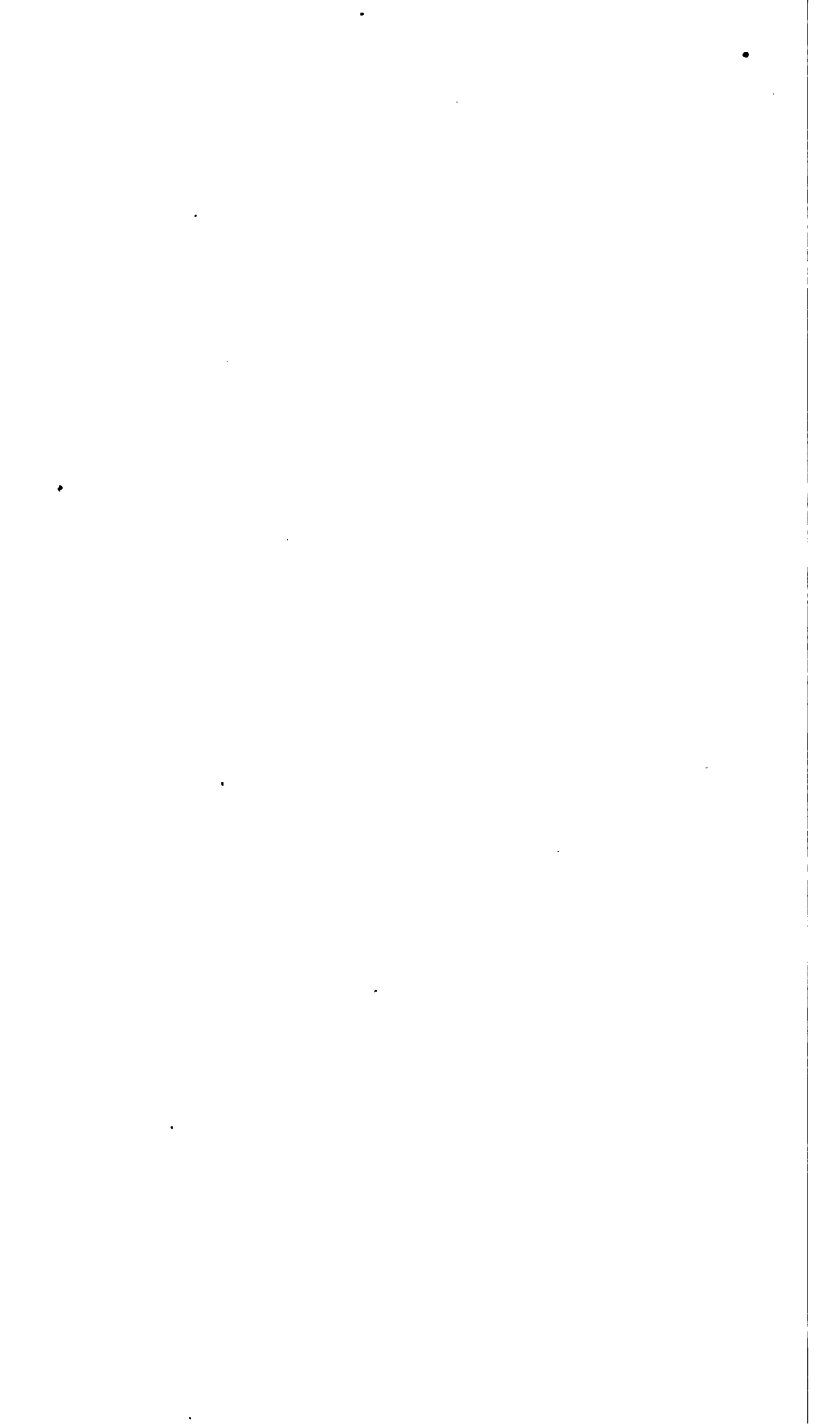












THE
AMERICAN STATE REPORTS,

CONTAINING THE

CASES OF GENERAL VALUE AND AUTHORITY,

**SUBSEQUENT TO THOSE CONTAINED IN THE "AMERICAN
DECISIONS" AND THE "AMERICAN REPORTS,"**

DECIDED IN THE

**COURTS OF LAST RESORT
OF THE SEVERAL STATES.**

SELECTED, REPORTED, AND ANNOTATED

**By A. C. FREEMAN,
AND THE ASSOCIATE EDITORS OF THE "AMERICAN DECISIONS."**

Vol. XIX.

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AMERICAN STATE REPORTS.

VOL. XIX.

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AMERICAN STATE REPORTS.

VOL. XIX.

CASES
IN THE
SUPREME COURT
OF
ILLINOIS

CHICAGO, BURLINGTON, AND QUINCY RAILROAD
COMPANY *v.* MEHLSACK.

[121 ILLINOIS, 61.]

COMMON CARRIERS — DUTY TO TRESPASSER. — A common carrier of passengers is not under the same obligation as to care and diligence in guarding against injuries to strangers, and especially to trespassers, as it is in guarding against injuries to passengers. The duty to the latter involves the use of the utmost care and diligence which can be bestowed by human skill and foresight, and is enforced by the highest considerations of public policy. The duty to the former rests merely upon grounds of general humanity and respect for the rights of others, and requires the carrier to perform the transportation service so as to not wantonly or carelessly be an aggressor toward third persons, whether such persons are on or off the vehicle.

COMMON CARRIERS. — A trespasser upon a railroad train attempting to obtain a free ride without the consent of the carrier cannot recover for an injury received, in the absence of proof of gross negligence amounting to wilful or wanton misconduct on the part of such carrier.

COMMON CARRIERS — DUTY TO TRESPASSER — INSTRUCTION. — In an action to recover for personal injury, where the main controversy is as to whether plaintiff, at the time, was a passenger on the train or a mere trespasser, and the evidence on this point is conflicting, an instruction which takes from the jury all consideration of evidence tending to show that plaintiff was attempting to obtain a free ride without the consent of the carrier, and which requires a verdict of guilty upon mere proof that the injury was caused by the negligence alleged, irrespective of whether plaintiff was a passenger or a mere trespasser, although the negligence alleged was such as would render the carrier liable only in case of injury to a passenger, is erroneous.

George Willard, for the appellant.

Joseph S. Kennard, Jr., and Brandt and Hoffman, for the appellee.

BAILEY, J. This was an action on the case, brought by Frank Mehlsack against the Chicago, Burlington, and Quincy Railroad Company, to recover damages for a personal injury. The injury complained of was sustained by the plaintiff while riding on the platform steps of one of the cars belonging to one of the defendant's passenger trains which at the time was running from Meagher Street to the Union Passenger Depot, in the city of Chicago. Said train was composed of a locomotive-engine and eight cars, to wit, a mail-car, which was next to the engine; three baggage-cars, which came next; and four passenger-coaches in the rear. Said train was a through passenger train from the west, the plaintiff having got aboard as the train stopped at Meagher Street. The evidence tends to show that the place on the train where he was riding at the time he was injured was on the steps of the front platform of the forward baggage-car, and that said steps, by coming in contact with some obstruction on the ground near the track, were broken off, and that the plaintiff was thereby thrown to the ground and injured in such manner as to necessitate the amputation of one of his legs about six inches below the knee. The evidence shows that he had purchased no ticket, and that he paid no fare, although he claims to have had in his possession sufficient money to pay the customary fare, if he had been called upon to do so, and that he was ready and willing to make such payment.

The declaration consists of five counts. The first, second, and fourth counts allege, in terms, that the plaintiff became a passenger upon said train, and that the defendant negligently failed to carry him safely, whereby he was injured. The third count alleges that the defendant was a common carrier of passengers, and that it was its duty to furnish a sufficient number of cars for such persons as might lawfully desire to enter its trains, and to carry said persons therein with safety, but that it did not furnish a sufficient number of cars, so that the plaintiff was unable to obtain a seat therein, or to enter the car from the platform where he stood, and that by means of said default, and the careless management of said train, an obstruction on the railroad struck and carried away a part of said platform, whereby the plaintiff was thrown to the ground and injured. The fifth count alleges that the defendant was a common carrier of passengers, and that it was its duty to remove from its track and right of way any and all obstructions which might or could endanger the safety of persons

lawfully riding upon its trains, yet the defendant negligently allowed certain obstructions to accumulate upon its right of way and in close proximity to its track, whereby said train came into collision with said obstructions, and thereby the part of the train upon which the plaintiff was standing was broken off and the plaintiff thrown to the ground and injured.

A trial was had on the plea of not guilty, and at said trial the jury found the defendant guilty, and assessed the plaintiff's damages at six thousand dollars, and for that sum and costs the plaintiff had judgment. On appeal to the appellate court said judgment was affirmed, and the case is brought here on appeal from the judgment of the appellate court.

The main controversy at the trial was as to whether the plaintiff, at the time he was injured, was a passenger on said train, or a mere trespasser seeking to obtain a ride without the knowledge or consent of the defendant or its employees in charge of the train, and without paying the customary fare, and upon this question the evidence was conflicting. The court thereupon gave to the jury, at the instance of the plaintiff, the following instruction: "If the jury believe, from the evidence, that the plaintiff, while in the exercise of ordinary care and without negligence on his part, was injured by negligence of the defendant, as alleged in the declaration, then the jury should find the defendant guilty, and and assess the plaintiff's damages." This instruction is clearly erroneous, for the reason that it wholly omits the hypothesis that the plaintiff, at the time of his injury, was a passenger on the defendant's train. The plaintiff, in his declaration, proceeds entirely upon the theory that the legal relation of carrier and passenger had been established between the defendant and him. In three counts of the declaration that relation is expressly averred, and the negligence charged is, a failure to perform the duties and exercise the diligence which that relation imposed. In each of the other counts the defendant is declared against as a common carrier of passengers, and although in those counts there is no express averment that the plaintiff had become a passenger, yet the duties which are alleged to have been neglected are those which a carrier owes to its passengers, and which it does not owe to a mere trespasser.

A common carrier of passengers is not under the same obligation as to care and diligence in guarding against injuries to strangers, and especially to trespassers, that it is in guarding against injuries to passengers. His duty to the latter involves

the use of the utmost care and diligence which can be bestowed by human skill and foresight, and is enforced by the highest considerations of public policy. But as to the former, his duty rests merely upon grounds of general humanity and respect for the rights of others, and requires him to so perform the transportation service as not wantonly or carelessly to be an aggressor towards third persons, whether such persons are on or off the vehicle: Schouler on Bailments and Carriers, sec. 620. In *Toledo etc. R'y Co. v. Beggs*, 85 Ill. 80, 28 Am. Rep. 613, we held that a person fraudulently riding on a free pass issued to another, and not transferable, was not a passenger, and that the railroad company would only be held liable for gross negligence which would amount to willful injury.

The above-mentioned instruction required a verdict of guilty upon mere proof that the injury complained of was caused by the negligence alleged in the declaration, irrespective of whether the plaintiff was a passenger or a mere trespasser, although the negligence alleged was such as would render a carrier liable only in case of injury to a passenger. This, in effect, took from the jury all consideration of the questions presented by the evidence, which tended to show that the plaintiff, at the time of his injury, was attempting to obtain a free ride without the consent of the defendant or its agents. If such was the fact, the defendant can be held liable only for the consequences of gross negligence amounting to willful or wanton misconduct, and such is not the negligence charged in the declaration.

A number of other instructions were given, but none of them, in our opinion, can have the effect of curing the error above pointed out. For said error, the judgments of the appellate and superior courts must be reversed, and the cause will be remanded to the latter court for a new trial.

Chicago West Division R'y Co. v. Ryan, 131 Ill. 474, was an action by a minor, through his next friend, to recover damages for a personal injury. He recovered a judgment for \$1,750. At the time of the accident, which occurred on one of the streets in the city of Chicago, the appellee, an infant scarcely seventeen months old, was struck and knocked down by one of appellant's street-cars, propelled by horses. His feet were caught under the wheels of the car, and one of them injured in such manner that its amputation became necessary a few hours afterwards. The driver of the car admitted that he saw the child upon the track just prior to the accident, and other witnesses testified that he was on the track, or a short distance from it, at the time. The horses attached to the car were going in an ordinary trot. The driver stated that when he first saw the child the latter was facing south, with his back to the car, and that when the driver was almost abreast of

him he turned and ran into the car. The driver did not slacken the pace of his horses when he saw the child, but had passed him as much as the full length of his horses before the child turned, when, and not before, he attempted to stop his team.

The court, in commenting on the facts, said, in effect, that the child was evidently startled by the noise of the car behind it, and turning, ran, child-like, into danger instead of avoiding it, and that, under the circumstances, it was for the jury to determine whether or not the driver used ordinary care and prudence in seeking to avoid the accident after discovering the danger. Proceeding, the court said: "The child was so young that it was incapable of exercising care, and cannot be charged with negligence. It is claimed that no recovery can be had against the defendant, unless the plaintiff's parents, or the custodian in whose charge they had placed him, exercised reasonable and ordinary care for his safety. It is assigned as error that none of the instructions given for the plaintiff required the jury to find the exercise of ordinary care by the parents or custodian, and that all the instructions asked by the defendant which did so require were refused. The question in this case is, whether the driver of the car could have avoided the injury to the plaintiff after the latter had been discovered to be in a position of danger. Even though the plaintiff had come into such position through the negligence of those having him in charge, the defendant's servant, who had control of the car, was bound to use reasonable care in avoiding an injury to the plaintiff, if he saw, or by the exercise of ordinary prudence might have seen, plaintiff's peril. If B, in the performance of some lawful work of his own, such as operating a street-car, has notice that A is in danger of being hurt by what B is doing, and that A is unable to escape the danger, then B must use reasonable care to prevent the threatened injury, and he is answerable for the want of such care"; citing, in support of this rule, *Illinois Central R. R. Co. v. Godfrey*, 71 Ill. 500; 22 Am. Rep. 112; *Werner v. Citizens' Ry Co.*, 81 Mo. 368.

The doctrine is thus stated by Shearman and Redfield in their work on the law of negligence (vol. 1, sec. 99, 4th ed.): "It is now perfectly well settled that the plaintiff may recover damages for an injury caused by defendant's negligence, notwithstanding the plaintiff's own negligence exposed him to the risk of the injury, if such injury was proximately caused by the defendant's omission, after becoming aware of the plaintiff's danger, to use ordinary care for the purpose of avoiding injury to him. We know of no court of last resort in which this rule is any longer disputed. . . . The plaintiff should recover, notwithstanding his own negligence exposed him to the risk of injury, if the injury of which he complains was proximately caused by the omission of the defendant, after having such notice of the plaintiff's danger as would put a prudent man upon his guard, to use ordinary care for the purpose of avoiding such injury. It is not necessary that the defendant should actually know of the danger to which plaintiff is exposed. It is enough if he has sufficient notice or belief to put a prudent man on the alert, and he does not take such precautions as a prudent man would take under similar notice or belief."

In all such cases, where the party in danger is an adult, the party inflicting the injury will be liable only for willful injury or gross negligence, because the injured party is presumed capable of making some effort to escape the threatened peril. In the case of a child of tender years, however, the defendant will be liable for want of ordinary care: *Philadelphia etc. R. R. Co. v. Spearen*, 47 Pa. St. 300; 86 Am. Dec. 544.

"Therefore the court very properly instructed the jury that if they should find, from the evidence, that the plaintiff was on the crossing, and in such a position as to show that he was likely to be injured by the advance of the car, then the driver was bound to use ordinary care to prevent such threatened injury, if he knew, or by ordinary care or attention to his duty might have known, of the danger, and by using ordinary care might have avoided it, but that, if the jury should believe, from the evidence, 'that the child ran in the way of the car so suddenly that the driver had no such notice of any danger to the child as to give him an opportunity to avoid the danger by the exercise of such presence of mind and of such ordinary care as is to be expected from men of ordinary coolness and prudence under such circumstances as were then surrounding him, then the plaintiff has no right to a verdict in his favor.'"

The evidence showed that the parents of the appellee were people in humble circumstances, who kept no servants, but maintained a small grocery-store, attended to by the family, the father being engaged part of the time as a teamster. On the day of the accident the mother was ironing, while the father sawed wood; and the appellee, in a baby-carriage, had been taken out for an airing by a brother fifteen years of age, who on the day of the accident had wheeled the carriage to the corner of a street near where the accident occurred, and while he was watching a house which was being moved on the street, or children playing thereon, the appellee slipped from the carriage and crept into the place of danger. In regard to these facts the court said: "If it be admitted that the older brother was negligent in suffering the child to get upon the street, such negligence on his part would not relieve the defendant from liability, if its servant could have avoided the injury after he discovered the danger. Hence it is unnecessary to discuss the question whether or not the negligence of the older brother can be imputed to the infant in this suit brought by the infant himself. Under the state of facts developed by the proofs, the negligence of the custodian of the child was an immaterial consideration, and therefore the court committed no error in omitting to require the jury to find that such custodian had exercised ordinary care. We discover no error in the record which would justify us in ordering a reversal. The judgment of the appellate court is therefore affirmed."

RAILROADS—LIABILITY FOR INJURIES TO TRESPASSERS UPON TRAINS.—Trespassers upon railroad trains, riding without any authority from the company to do so, cannot recover for injuries sustained through the company's negligence: *Darwin v. Charlotte etc. R. R. Co.*, 23 S. C. 531; 55 Am. Rep. 32; *Files v. Boston etc. R. R. Co.*, 149 Mass. 204; 14 Am. St. Rep. 411; unless there is gross negligence or willful misconduct on the part of the company: *Rounds v. Delaware etc. R. R. Co.*, 64 N. Y. 129; 21 Am. Rep. 597; *Hoffman v. New York etc. R'y Co.*, 87 N. Y. 25; 41 Am. Rep. 337; *Kansas City etc. R. R. Co. v. Kelly*, 36 Kan. 655; 59 Am. Rep. 596. One who is injured by the negligence of a railroad company while riding upon one of its trains on a commutation ticket issued to another person, and by its terms not transferable, has no remedy against the company: *Way v. Chicago etc. R. R. Co.*, 64 Iowa, 48; 52 Am. Rep. 431, and note 434-436.

BORDEN v. CROAK.

[181 ILLINOIS, 68.]

LIEN ON AFTER-ACQUIRED PROPERTY — BURDEN OF PROOF. — If a landlord is seeking to enforce a lien for rent on the goods of his deceased tenant, under a provision in the lease not covering subsequently acquired property, the burden of establishing the lien is upon the landlord; and in the absence of proof that the tenant was the owner of the goods at the time he took the lease, it will be assumed that they are all after-acquired property.

LIEN ON AFTER-ACQUIRED PROPERTY. — Where an attempt is made by a clause in a lease to create a valid and first lien for rent "upon the property of the person liable therefor," but no particular property or class of property is described, nor the description limited to personal property, the lien is void for uncertainty of description, when applied to property owned at the time, and *a fortiori* void when applied to after-acquired property.

LIEN ON AFTER-ACQUIRED PROPERTY. — If it is the intention of the parties creating a lien on personal property that it shall extend to after-acquired property, such intention must be clearly expressed.

CHATTEL MORTGAGE OF AFTER-ACQUIRED PROPERTY — RULE AT LAW AND IN EQUITY. — At common law, a mortgage can operate only on property actually in existence at the time of giving the mortgage and actually or potentially belonging to the mortgagor. In equity, however, while the mortgage does not pass the title to after-acquired property, it creates in the mortgagee an equitable interest therein which will prevail even against judgment creditors and others, although the mortgagee has not taken possession of the property, and the mortgagor has done no new act to confirm the mortgage. The mortgage, though inoperative as a conveyance, is operative as an executory agreement, which attaches to the property when acquired, and the beneficial interest is transferred to the mortgagee, the mortgagor being regarded as his trustee, in accordance with the maxim that equity considers that as done which ought to be done.

LIEN — WHEN GOVERNED BY RULES APPLICABLE TO CHATTEL MORTGAGES. — A lien for rent created by lease, and claimed on property left in the possession of the tenant, is in the nature of a mortgage, rather than of a pledge, and is governed by the rules of law applicable to chattel mortgages.

LIEN ON AFTER-ACQUIRED PROPERTY — SPECIFIC PERFORMANCE. — A contract for the sale or mortgaging of subsequently acquired chattels will not be specifically enforced, where no chattels are specifically described, the only description being that contained in the general word "property." The equitable title to goods as well as to land is confined to specific property, and does not extend to goods which are undetermined.

JUDGMENT — IMPEACHMENT. — So long as a judgment is correct, it cannot be impeached by showing that the court proceeded upon erroneous principles in reaching its conclusion.

JUDGMENT WILL NOT BE REVERSED FOR ERRORS committed at the instance or in favor of the party seeking the reversal.

Wilson and Moore, for the appellant.

Young and Makeel, for the appellee.

BAILEY, J. William Borden filed his petition in the probate court of Cook County, in the matter of the estate of Thomas R. Croak, deceased, representing that by the provisions of a certain lease executed by the petitioner to said Croak, in his lifetime, the petitioner was entitled to a valid and first lien upon all the goods and property of said Croak that might at any time during the term of the lease be situated in or upon the demised premises for any rent accrued or to accrue, together with all costs and expenses of collecting the same, and praying to be allowed his claim for \$250 for rent alleged to be in arrears, and that the same should be declared to be a first lien upon a stock of goods and merchandise kept by the lessee on said premises in his lifetime, and that the administratrix be ordered to pay the same out of the moneys arising from the sale of said stock of goods. The probate court, on the hearing of said petition, found that the petitioner was entitled to a first lien on said goods, as therein alleged, and ordered the administratrix to pay him said sum of \$250 out of the proceeds thereof. On appeal to the circuit court, a hearing was had, resulting in an order declaring that the petitioner was not entitled to any preference or priority over any of the other creditors of said estate, and that he had no lien on the assets in the hands of the administratrix, but allowing his claim for \$250 as a claim of the seventh class, to be paid in due course of administration. This order was affirmed by the appellate court on appeal, and the judges of that court having certified that the case involves questions of law of such importance, on account of principal and collateral interests, that it should be passed upon by this court, the record is now brought here by a further appeal.

The facts upon which the hearing in the circuit court was had appear by stipulation, and so far as they are material to the questions arising upon the present appeal, are, in substance, as follows: Said Croak, in his lifetime, was a merchant tailor, and was occupying, for the purpose of carrying on that business, a room in the Borden Block, Chicago, under a lease from the petitioner. Said lease was dated February 15, 1886, and demised to said Croak, for the term of one year, commencing May 1, 1886, the store in Borden Block known as No. 101 Randolph Street, to be used for a merchant-tailoring store. The rent reserved was fifteen hundred dollars, payable in equal monthly installments, in advance, on the first day of

each and every month during said term. Among the various provisions of said lease was the following:—

"The party of the first part, his heirs, executors, administrators, or assigns, shall have, at all times, the right, upon request, to enter upon said demised premises to inspect their condition, and also to make any needful repairs or alterations which said party may desire or see fit to make, and also have a right of distress, and also a valid and first lien for said rent accruing or to accrue, upon the property of the person or persons liable therefor, and also for the damages for the breach of any of the covenants herein contained, and the expenses, including attorney's fees, incurred in enforcing the same, and which are to be repaid to said first party, and which may be included and allowed in the suit as part of the damages."

Said Croak died June 8, 1886, and the appellee, having been appointed administratrix of his estate, advertised for the presentation of claims, and claims were presented to the amount of \$3,522.90, not including the claim of the petitioner for rent, and the appraisers allowed the appellee, as the widow of the deceased, the sum of \$2,410 as her widow's award. On the fourteenth day of June, 1886, said administratrix filed her petition for an order to sell all the goods and chattels belonging to said estate, for the payment of debts, and on the same day the probate court entered an order as prayed for, and thereupon the administratrix at once removed from the demised premises the stock of merchandise belonging to the deceased, and sold and converted it into money, realizing therefor the sum of \$1,357. The remaining chattels belonging to said estate were also sold for sums which, added to the proceeds of the stock of goods, amounted to \$1,565.10. On the 7th of September, 1886, the administratrix made due report of said sale, and on the same day, by order of the probate court, said report was approved.

All the rent of said premises accruing prior to June 1, 1886, was paid by said Croak in his life. The petitioner claims only for the rent reserved for the months of June and July, 1886, he having accepted a surrender of the demised premises and rented them to another tenant about September, 1886, and having expressly waived his claim for rent for the month of August, 1886. The petitioner's right to recover rent for said months of June and July is not contested.

The only question arising upon the record is, whether, by the terms of said lease, the petitioner acquired a first lien upon

said stock of merchandise by virtue of which he is now entitled to payment out of the proceeds of said goods in preference to the other creditors of the estate. There is, however, no evidence that any portion of the goods which came into the hands of the administratrix were owned by her intestate at the date of the lease. If any inference on that subject is to be drawn from the admitted facts, it is in favor of the theory that said goods were purchased and acquired by said intestate after that date. The burden of proving the facts necessary to the establishment of the lien is clearly upon the petitioner, and in the absence of proof that the intestate was the owner of said property at the time he took the lease, it will be assumed, as against the petitioner, that it is all after-acquired property. The question then is narrowed down to whether the provisions of the lease are sufficient to vest in the lessor such lien upon after-acquired property as will enable him to pursue the proceeds of such property into the hands of the lessee's administratrix.

It may well be doubted whether the terms of the lease are not too general and uncertain to create a valid lien even upon the property owned by the lessee at the time that instrument was executed. The attempt was to create a valid and first lien for the rent "upon the property of the person or persons liable therefor." No particular property or class of property is described, nor is the description limited to personal property. The word used would seem to apply indiscriminately and with equal appropriateness to every species of property of the lessee, whether real, personal, or mixed, of whatever character or wherever situated. Such description may well be held to be void for uncertainty even when applied to property owned at the time, and, *a fortiori*, may it be held to be void when applied to after-acquired property.

It cannot be said, however, that the language of the lease has any application to after-acquired property. In interpreting the words of an instrument, we should view them from the position, both as to time and circumstances, in which the parties stood when they used them. The lessee speaking, at the date of the lease, of his "property" manifestly refers to the property he then owned, and nothing more. If at that time he had executed an instrument conveying, assigning, or mortgaging his "property," without qualifying words, no one would for an instant suppose that he was attempting to dispose of his future acquisitions. How, then, can it be said that an

instrument by which he attempted to create a lien upon his "property," without words indicating an intention to subject to the lien his future acquisitions, can have any broader application?

The case of *Tapfield v. Hillman*, 6 Man. & G. 245, is in point. There a lessee executed to his lessor, by way of mortgage, an assignment of the furniture and stock in trade in, about, upon, and belonging to an inn, with a power, upon non-payment, to enter into, possess, hold, and enjoy the inn for the residue of the assignor's term, and "to take, possess, hold, and enjoy all the goods, chattels, effects, and premises," and it was held that nothing passed but what was in, upon, or about the inn at the time of the assignment; Tindall, C. J., saying: "If the intention of the parties was, that the security should extend to subsequently acquired property, that intention should have been clearly expressed." See also *Phillips v. Both*, 58 Iowa, 499; Jones on Chattel Mortgages, sec. 173 a.

But even if the description in the lease could be held to include subsequently acquired property, it is not sufficiently definite and certain to create a lien thereon. The lien claimed is one where the property is left in the possession of the debtor, and it is therefore in the nature of a mortgage rather than a pledge, and is to be governed by the rules of law applicable to chattel mortgages. At common law a mortgage can operate only on property actually in existence at the time of giving the mortgage, and then actually belonging to the mortgagor, or potentially belonging to him as an incident of other property then in existence and belonging to him: Jones on Chattel Mortgages, sec. 138, and authorities cited. Where the mortgage contains the power of seizure on default, — and the right to distrain stipulated for in the present lease may be regarded as giving such power of seizure, — the execution of such power may give effect to a mortgage of subsequently acquired property, not only as between the parties, but also as against third parties claiming under the mortgagor: Jones on Chattel Mortgages, secs. 160 et seq.

A different rule, however, prevails in equity. There, while such mortgage itself does not pass the title to such property, it creates in the mortgagee an equitable interest in it, which will prevail, even against judgment creditors and others, although the mortgagee has not taken possession of the property, and the mortgagor has done no new act to confirm the mortgage. The ground of the doctrine is, that the mortgage,

though inoperative as a conveyance, is operative as an executory agreement, which attaches to the property when acquired, and in equity transfers the beneficial interest to the mortgagee, the mortgagor being regarded as a trustee for him, in accordance with the familiar maxim that equity considers that as done which ought to be done: Jones on Chattel Mortgages, sec. 170.

This doctrine is fully and elaborately considered in the leading case of *Holroyd v. Marshall*, 10 H. L. Cas. 191, and in discussing it, Lord Chancellor Westbury says: "It is quite true that a deed which professes to convey property which is not in existence at the time of the conveyance is void at law, simply because there is nothing to convey. So in equity, a contract which engages to transfer property not in existence cannot operate as an immediate alienation, merely because there is nothing to transfer. But if a vendor or mortgagor agrees to sell or mortgage property, real or personal, of which he is not possessed at the time, and he receives the consideration for the contract, and afterwards becomes possessed of property answering the description in the contract, there is no doubt that a court of equity would compel him to perform the contract, and that the contract would, in equity, transfer the beneficial interest to the mortgagee or purchaser immediately on the property being acquired. This, of course, assumes that the supposed contract is one of that class of which a court of equity would decree a specific performance." See *Gregg v. Sanford*, 24 Ill. 17; 76 Am. Dec. 719; *Webster v. Nichols*, 104 Ill. 160; *McCaffrey v. Woodin*, 65 N. Y. 459; 22 Am. Rep. 644.

The question then is, whether a contract for the sale or mortgaging of subsequently acquired chattels will be specifically enforced in equity, where no chattels are specifically described, the only description being that contained in the general word "property." It is undoubtedly the rule that the equitable title to goods as well as to land is confined to specific property, and does not extend to goods which are undetermined. As said by the lord chancellor in *Holroyd v. Marshall*, 10 H. L. Cas. 191: "A contract for the sale of goods, as, for example, of five hundred chests of tea, is not a contract which would be specifically performed, because it does not relate to any chests of tea in particular; but a contract to sell five hundred chests of the particular kind of tea which is now in my warehouse is a contract relating to specific property, and which would be specifically performed."

In *Tadman v. D'Epineuil*, L. R. 20 Ch. Div. 758, a party, by a written instrument, charged "all his present and future personalty" to secure future indebtedness to the plaintiff, and afterwards become indebted to him, and upon the principles laid down in *Helroyd v. Marshall*, 10 H. L. Cas. 191, it was held that the instrument operated to charge all the personal property belonging to the debtor at the date of the instrument, but did not operate to charge subsequently acquired property. In *Belding v. Reed*, 3 Hurl. & C. 955, a debtor assigned to his creditor by bill of sale all his household furniture, plate, linen, etc., and all his other personal estate and effects whatsoever, then being or thereafter to be upon or about his dwelling-house, farm, or premises, or elsewhere in Great Britain, upon trust to sell and satisfy his debt. Power was given the creditor to enter the premises where the goods assigned might be, and take possession thereof; but it was provided that until he should see fit to do so, the debtor might retain possession. After five years, the debtor having in the mean time become a bankrupt, the creditor, after having demanded payment, entered and, with other goods of the debtor, seized goods which the debtor had acquired subsequent to the execution of the bill of sale. In an action of trover by the assignee in bankruptcy, it was held that as the goods were not identified by the bill of sale, the creditor took no title to them, and that the action might be maintained.

The rule established by the foregoing authorities, and which we are disposed to adopt, does not, in our opinion, conflict with the previous decisions of this court to which our attention has been directed. Thus in *Webster v. Nichols*, 104 Ill. 160, the after-acquired property which was held to be within the lien created by the provisions of the lease consisted of certain buildings and improvements put upon the demised premises by the tenant, and which were described in the lease as such, and were thus precisely identified. The other cases cited do not seem to involve the principle here under discussion, and therefore need not be particularly noticed.

Upon the trial, a number of propositions submitted by the petitioner were held by the court as the law in the decision of the case. Some of those propositions were, in our opinion, more favorable to the petitioner than was warranted by the rules of law applicable to the case. The position seems to be now taken by counsel for the petitioner that because the appellee has not challenged the soundness of the propositions so

held by cross-errors, such propositions must be conclusively held as the law of the case, and that it was not open to the appellate court, and is not open to this court, to review them, or to hold that the law applicable to the case is different from that established by the propositions thus adopted. The position thus taken is obviously unsound. The question here is, whether the trial court, upon the facts presented and the rules of law applicable thereto, reached a correct judgment. The mode of reasoning upon which he proceeded is immaterial. So long as the conclusion is right, it cannot be impeached by showing that the court proceeded upon erroneous principles in reaching it. The errors of the trial court were errors committed at the instance and in favor of the appellant, and such errors manifestly cannot be set up as a ground for reversing the judgment. The case is not different from one where a trial court instructs the jury more favorably for the defeated party than the law will warrant. A judgment will never be reversed for errors committed at the instance or in favor of the party seeking the reversal.

We find no error in the record, and the judgment of the appellate court will therefore be affirmed.

MORTGAGES ON CHATTELS NOT YET ACQUIRED. — As to the validity and effect of chattel mortgages upon property to be acquired, see *McCaffrey v. Woodin*, 65 N. Y. 459; 22 Am. Rep. 644, and note 653-656; *Moody v. Wright*, 13 Met. 17; 46 Am. Dec. 706, and note 712-718; *Moore v. Byrum*, 10 S. C. 452; 30 Am. Rep. 63-68; *Gregg v. Sanford*, 24 Ill. 17; 76 Am. Dec. 719, and note 723-733; *Morrill v. Noyes*, 56 Me. 458; 96 Am. Dec. 486; *Long v. Hince*, 40 Kan. 220; 10 Am. St. Rep. 192, and note.

PUTERBAUGH v. SMITH.

[181 ILLINOIS, 199.]

CONTEMPT — CONSTITUTIONAL LAW. — Courts have power, for the purpose of enforcing their authority during the progress of trials, for the speedy, orderly, and impartial administration of justice between litigants, and the enforcing of final judgments and orders of the court after the trial, to summarily punish for contempt, provided they do not violate constitutional provisions guaranteeing trial by jury.

CONTEMPT — JURISDICTION TO PUNISH. — Proceedings by contempt, to enforce the authority of a jurisdiction different from that of the court enforcing it, are unknown to the common law. The rule is, that the court alone in which the contempt is committed, or whose order or authority is defied, has power to punish it, or to entertain proceedings to that end.

CONTEMPT — CONSTITUTIONAL LAW — RIGHT OF TRIAL BY JURY. — A statute authorizing a judge of a circuit court in vacation to punish in a summary manner, by fine and imprisonment, any person who shall refuse to obey a subpoena of a notary public to appear and have his deposition taken or to sign such deposition, is void as being in conflict with constitutional provisions guaranteeing a trial by jury.

CONTEMPT — CONSTITUTIONAL LAW. — The legislature has no power to make that punishable as a contempt which, in the nature of things, cannot be a contempt of the authority imposing the punishment.

Horatio G. Burchard, for the appellant.

SCHOLFIELD, J. By the act approved May 31, 1879, amending section 36 of chapter 51 of the Revised Statutes of 1874, entitled "Evidence and Depositions," notaries public and other officers therein named who may at any time be required to take depositions in any cause pending in any court of law or equity in this state, or by virtue of any commission issued out of any court of record in any other state, are empowered to issue subpoenas to compel the attendance of witnesses, and if any witness shall willfully neglect or refuse to obey such subpoena, etc., the officer issuing the same is required to at once report, in writing, the fact of such willful refusal or neglect, and file the same with the clerk of the circuit court of the county. And the section then proceeds thus: "And thereupon attachment shall issue out of said court against such offending witness, returnable forthwith, before the circuit court of such county, if in term time, or before any judge of said court, if in vacation, who shall hear and determine the matter in a summary way; and it appearing to the court that the neglect or refusal of such witness to appear or testify, or to subscribe such deposition, as aforesaid, is willful and without lawful excuse, the court shall punish such witness by fine and imprisonment in the county jail, or by fine or imprisonment in the county jail, as the nature of the case may require, as is now, or as may hereafter be, lawful for the court to do in cases of contempt of court": Public Laws of 1879, p. 162.

Appellant was subpoenaed to attend before a notary public and give his deposition in a case pending before a court in the state of Kansas, and he was imprisoned by order of the judge of the circuit court of the circuit in which the deposition was attempted to be taken, made in vacation, on summary process, without the benefit of trial by jury. The pleadings present the question whether so much of the statute as assumes to authorize this is within the prohibition of section 9, article

2, of our constitution, which guarantees that in all criminal prosecutions the accused shall have a trial by an impartial jury of the county or district in which the offense is alleged to have been committed, and the case is therefore brought directly to this court from the trial court.

We may, and do, concede that the mere enforcing of the authority of the court, during the progress of trials, for the speedy, orderly, and impartial administration of justice between litigants, and the enforcing of the final judgments and orders of the court after the trial, according to the principles and precedents of the common law, are not within the contemplation of this provision of the constitution. But proceedings by contempt, to enforce the authority of a jurisdiction different from that of the court enforcing it, are unknown to the common law. Thus Blackstone says: "The contempts that are thus [summarily] punished are either direct, which openly insult or resist the powers of the courts or the persons of the judges who preside there, or else consequential, which, without such gross insolence or direct opposition, plainly tend to create a universal disregard of their authority": 4 Bla. Com. 283; Sharswood's ed., *284; see also Hawk. P. C., b. 1, c. 6. And so it is said in Rapalje on Contempt, section 13: "It is a well-settled rule that the court alone in which a contempt is committed, or whose order or authority is defied, has power to punish it, or to entertain proceedings to that end." See also authorities cited in note 3, on same page; Hawes on Jurisdiction of Courts, sec. 223.

Where a person refuses to appear before a notary public and give his deposition, in obedience to a subpoena issued by him, it may be truly said that he acts in contempt of the authority of the notary; but how can it be said that he thereby acts in contempt of the circuit court, or of the judge of that court? He owed, by reason of the service of the subpoena, no duty to the circuit court or to the judge thereof. As to the circuit court and its judge, his failure to obey the subpoena simply placed him in the same situation as all other willful violators of the law. No one would pretend that it is competent for the general assembly to enact that the crimes and misdemeanors enumerated in the Criminal Code shall hereafter be contempts of court, and summarily punished as such, and thus deny to the parties accused the right of trial by jury; and this, for the plain reason that the general assembly cannot deny to individuals the guaranteed rights of the constitution by simply

changing the names of things. It cannot make that punishable as a contempt which, in the nature of things, cannot be a contempt of the authority imposing the punishment.

In the instances *supra*, where we concede the right to exist to proceed summarily for contempt, it is manifest the right is indispensable to the execution of the functions of the court; for if every coercive step must be preceded by a jury trial, it is manifest that a party, by the simple repetition of disobedience or resistance, might render trials interminable: *Johnston v. Commonwealth*, 1 Bibb, 602. But where an individual is being proceeded against in one tribunal for an act done in the presence and in derogation of the authority of a different tribunal, the ability of the trial tribunal to exercise its proper functions is not involved. The act charged had no tendency to hinder or delay it in the lawful execution of its authority. It takes no notice, as of its own knowledge, of anything connected with the offense charged, but everything must be proved, as in any other criminal case.

We held in *Storey v. People*, 79 Ill. 45, 22 Am. Rep. 158, that the publication of a libel, not directly calculated to hinder, obstruct, or delay courts in the exercise of their proper functions, could not be treated and punished summarily as a contempt of court. And the same principle applied here requires that we shall hold that that which is not an obstruction of the exercise of the functions of a court in conducting trials before it, or in enforcing its process, shall not be punishable as a contempt of court, summarily, and without trial by jury. Wherever there is a criminal prosecution,—and that is always the case where the proceeding is an original one to have a party punished for the violation of a statute,—the defendant is entitled, under the constitution, to a jury trial. So much of the present statute, therefore, as authorizes the circuit judge to proceed summarily, and without a jury, being contrary to the constitution, is void, and not law.

The judgment is reversed, and the cause remanded for further proceedings in conformity with this opinion.

CONTEMPT — JURISDICTION TO PUNISH FOR. — Only the court in which or against which a contempt is committed can punish therefor: Note to *Clark v. People*, 12 Am. Dec. 183, 184; *Langdon v. Circuit Court*, 76 Mich. 358; *In re Deaton*, 105 N. C. 59.

CONTEMPT IS PUNISHABLE IN A SUMMARY MANNER by the court, and such power to punish is essential to the very existence of every court: *Neel v. State*, 9 Ark. 259; 50 Am. Dec. 209, and note. And summary punishment

for contempt is not prohibited by the constitutional provision that "the right of trial by jury shall remain inviolate", *State v. Doty*, 32 N. J. L. 403; 90 Am. Dec. 671, and note.

CONTEMPT—REFUSAL TO OBEY NOTARY'S SUBPOENA.—The superior court in which an action is pending has no power, under the California code, to punish a person for contempt because he has refused to obey a subpoena issued by a notary public before whom his deposition was to have been taken: *Leinsky v. Superior Court*, 72 Cal. 510.

LAFLIN AND RAND POWDER COMPANY v. TEARNEY.

[121 ILLINOIS, 322]

NUISANCE—GUNPOWDER-MAGAZINE situated so near to the dwelling-house of another as to be liable to inflict serious injury to his person or property in case of explosion is a private nuisance making the owner liable, whether the powder was carefully kept or not.

NUISANCE—NEGLIGENCE—GUNPOWDER-MAGAZINE.—As a general rule, the question of care or want of care is not involved in an action for injuries resulting from a nuisance; consequently, if actual injury results from the keeping of gunpowder, the person keeping it will be liable, even though the explosion is not chargeable to his personal negligence. Hence it is not necessary to charge him with negligence.

NUISANCE—ALLEGATIONS.—In alleging the maintenance of a nuisance, it is not necessary to use the word "nuisance," if the facts alleged constitute a nuisance.

NUISANCE—DEFINITION.—A private nuisance is anything done to the hurt or annoyance of the lands, tenements, or hereditaments of another. Any unwarrantable, unreasonable, or unlawful use by a person of his own property, real or personal, to the injury of another, comes within the definition, and renders the owner or possessor liable for all damages arising from such use.

NUISANCE—ALLEGATION THAT POWDER-MAGAZINE EXPLODED shows that it was dangerous; and an allegation that the explosion destroyed plaintiff's buildings shows that the keeping of gunpowder in the magazine, considered with reference to "the locality, the quantity, and the surrounding circumstances," constitutes it a nuisance *per se*. Hence a complaint containing these allegations is sufficient.

NUISANCE—VIOLATION OF ORDINANCE.—The keeping of gunpowder in a magazine in a town, in violation of an ordinance, is an illegal act, rendering the party keeping it guilty of malfeasance, and liable for all consequences resulting from the act, regardless of the question of exercise of care by the party injured.

NUISANCE—GUNPOWDER-MAGAZINE—INADEQUATE DEFENSE.—In an action to recover damages to buildings caused by the explosion of a gunpowder-magazine adjacent thereto, it is no defense that there were other powder-magazines in the same neighborhood at the time; that they were there when the land was bought and the injured buildings erected; that plaintiff's husband had been employed in the powder business; that the property was bought and such buildings erected after the erection of defendant's magazine, in order that plaintiff's husband might be near the

magazines; that he had been a stockholder in a powder company, and that plaintiff had leased her land to powder companies for the purpose of storing powder thereon.

NUISANCE — WHEN MAY BE REMOVED. — Carrying on an offensive or dangerous trade or business for any number of years in a place remote from buildings and public roads does not entitle the owner to continue it in the same place after houses have been built and roads laid out in the neighborhood, to the occupants of which, and the travelers upon which, it is a nuisance. As the city extends, such nuisances should be removed to the vacant grounds beyond the immediate neighborhood of the residence of the citizens.

Mills and Ingham, and E. F. Runyan, for the appellant.

Barnum, Evans, and Barnum, for the appellee.

MAGRUDER, J. This is an action on the case brought in the superior court of Cook County by the appellee against the appellant company to recover damages to the dwelling, barn, and other outhouses upon the premises of appellee, resulting from the explosion of a powder-magazine upon the premises of appellant. The buildings of the plaintiff and the powder-magazine in question were located upon a street called Archer Avenue, in the town of Lake, in the outskirts of the city of Chicago, in Cook County. Verdict and judgment in the trial court were in favor of the plaintiff, and such judgment, having been affirmed by the appellate court, is brought here from the latter court by appeal.

The first instruction given for the plaintiff is as follows: "If the jury find from the evidence that the plaintiff has made out her case as laid in her declaration, then the jury must find for the plaintiff." Defendant took exception to the giving of this instruction. We have held that such an instruction does not make the jury the judges of the effect of the averments of the declaration, but merely empowers them to determine whether the proof introduced sustains the issues made by the pleadings in the case: *Ohio & M. R'y Co. v. Porter*, 92 Ill. 437; *Pennsylvania Co. v. Marshall*, 119 Ill. 399.

The declaration was not demurred to. After the plaintiff had closed her testimony, the defendant moved that the jury be directed to return a verdict in favor of the defendant, which motion was overruled, and exception was taken. After the motion for new trial was overruled, defendant also moved in arrest of judgment, which latter motion being overruled, exception was entered.

It is claimed by the appellant that the declaration does not set out a cause of action. The first objection made to the

declaration is, that it does not charge the defendant with negligence. The objection is not well taken.

The powder-magazine kept by the defendant upon its premises was so situated with reference to the dwelling-house of the plaintiff that it was liable to inflict serious injury upon her person or her property in case of an explosion. It was a private nuisance, and therefore the defendant was liable, whether the powder was carefully kept or not. As a general rule, the question of care or want of care is not involved in an action for injuries resulting from a nuisance. If actual injury result from the keeping of gunpowder, the person keeping it will be liable therefor, even though the explosion is not chargeable to his personal negligence: Wood on Nuisances, 1st ed., secs. 73, 115, 130, 142; *Heeg v. Licht*, 80 N. Y. 579; 36 Am. Rep. 654; *Cheatham v. Shearon*, 1 Swan, 213; 55 Am. Dec. 734; *Stout v. McAdam*, 2 Scam. 67; 33 Am. Dec. 441; *Ottawa Gas etc. Co. v. Thompson*, 39 Ill. 600; *Nevins v. City of Peoria*, 41 Ill. 502; 89 Am. Dec. 392; *Cooper v. Randall*, 53 Ill. 24; *Myers v. Malcolm*, 6 Hill, 292; 41 Am. Dec. 744; *Hay v. Cohoes Co.*, 2 N. Y. 159; 51 Am. Dec. 279; *Phinizy v. Augusta*, 47 Ga. 263; *Burton v. McClellan*, 2 Scam. 434; *Weir's Appeal*, 74 Pa. St. 230.

The second objection to the declaration is, that it does not specifically aver the powder-magazine to be a nuisance. It was not necessary to use the word "nuisance," if the facts alleged constituted a nuisance. The declaration avers that it was the duty of the defendant to so use its premises as not to jeopardize the buildings of the plaintiff, and not to store upon its premises any dangerous substance whereby plaintiff's property might be destroyed in case of an explosion; that the defendant did keep upon its premises a magazine of gunpowder, dynamite, etc., and stored therein a large amount of gunpowder, dynamite, etc.; that the gunpowder, dynamite, etc., so kept upon said premises exploded, and that by means of such explosion "the material of which such magazine was constructed was then and there driven with great force and violence upon and against the property of the plaintiff hereinbefore described," and that "the following property of the plaintiff was by means of such explosion struck by flying missiles, rocks, and stones, and was wrecked and torn by means of the concussion of the air, then and there caused by said explosion, and was totally destroyed and lost, and was of great value, to wit, one two-story frame dwelling," etc. "A pri-

vate nuisance is defined to be anything done to the hurt or annoyance of the lands, tenements, or hereditaments of another: 3 Bla. Com. 216. Any unwarrantable, unreasonable, or unlawful use by a person, of his own property, real or personal, to the injury of another, comes within the definition stated, and renders the owner or possessor liable for all damages arising from such use": *Heeg v. Licht*, 80 N.Y. 579; 36 Am. Rep. 654.

The averments of the declaration bring the present case within the definition thus quoted. The fact that the magazine exploded shows that it was dangerous. The fact that the explosion destroyed plaintiff's buildings shows that the keeping of gunpowder in the magazine, considered with reference to "the locality, the quantity, and the surrounding circumstances," constituted a nuisance *per se*: *Heeg v. Licht*, 80 N. Y. 579; 36 Am. Rep. 654; Wood on Nuisances, sec. 142.

The declaration contains two counts. The second count, in addition to the averments of the first, as above set forth, further avers that there was an ordinance in the town of Lake ordaining that "no powder-magazine or place for storing or keeping gunpowder or other explosive material shall be kept or maintained within the town, provided, however, the provisions of this section shall not be held or construed to apply," etc., to any magazine located upon a lot of a certain size and area; and that the defendant's magazine was located upon a lot of a smaller size than that required by the ordinance.

It is claimed by the defendant that the injury to the plaintiff's property was not caused by the violation of this ordinance, and therefore that such violation imposes no liability upon the defendant. We do not concur in this view. If the magazine had not been where it was, the explosion would not have taken place, and the injury to plaintiff's property would not have resulted. The ordinance absolutely prohibited any powder-magazine from being kept within the town, unless the lot upon which it was located should be of a certain size. The defendant kept its magazine within the town upon a smaller lot than the law required. Its magazine was in the town in violation of the law. The keeping of gunpowder in the town was an illegal act. "If an illegal act be done, the party doing or causing the act to be done is responsible for all consequences resulting from the act": *Burton v. McClellan*, 2 Scam. 434.

The cases referred to by counsel as holding a contrary doctrine have no application here. In those cases it is held that where the plaintiff's right of recovery depends upon his own exercise of due care as well as upon the defendant's negligence, the failure of the defendant to comply with some statutory requirement, such as ringing a bell, or blowing a whistle, or erecting a sign-board, will not of itself authorize a recovery, in the absence of such care on the part of the plaintiff. There the injury is attributable to the plaintiff's want of ordinary care, and the defendant's neglect of a statutory requirement cannot be set up as an excuse. Here there is no question of the exercise of care by the plaintiff, nor is it a mere matter of non-feasance on the part of the defendant. In keeping a powder-magazine in the town without complying with the condition named in the ordinance, the defendant was guilty of malfeasance. Its offense is similar to that of bringing diseased cattle into the state in violation of the act of the legislature on that subject, as discussed in *Somerville v. Marks*, 58 Ill. 371, and *Sangamon Distilling Co. v. Young*, 77 Ill. 197.

The appellant complains of the refusal of the court to instruct the jury that there could be no recovery if they should find from the evidence that there were other powder-magazines in the neighborhood where plaintiff lived; that such magazines were there when plaintiff bought her lot and erected her buildings; that her husband had been employed in the powder business; that she bought her property in order that her husband might be near the magazines; that she bought said property after the location and erection of defendant's magazine; that her husband had been a stockholder in one of the powder companies; and that she had leased some of her own land to powder companies for the purpose of storing powder thereon.

It is claimed that if the foregoing facts were found to be true, the plaintiff assumed the risk of being injured by the explosion of defendant's magazine.

If a servant enters the employment of his master, knowing it to be dangerous and unsafe, he assumes the risks attendant upon such employment, and waives all claim for damages against his employer in case of injury. In such cases the risks are a part of the contract of service: 2 Thompson on Negligence, 1008. But in the present case it is not pretended that either the plaintiff or her husband had ever been employed by the defendant, or had ever had any interest in

defendant's powder-magazine or business, or that there had ever been any relations of any kind between her or her husband and the defendant.

In *Cooper v. Randall*, 53 Ill. 24, which was an action to recover damages for the erection, on a lot adjacent to plaintiff's dwelling-house, of a flouring-mill, which threw chaff, dust, smut, and dirt into plaintiff's house, the defendants sought to prove that another house in the same neighborhood, owned and rented by the plaintiff, was a disreputable house. The evidence was held to be inadmissible, because wholly foreign to the issue. "The issue was, whether the mill was an injury to this property, and no light could be shed upon that question by evidence in regard to the occupancy of another house in the neighborhood."

In *Weir's Appeal*, 74 Pa. St. 230, it was said: "Carrying on an offensive trade for any number of years in a place remote from buildings and public roads does not entitle the owner to continue it in the same place, after houses have been built and roads laid out in the neighborhood, to the occupants of which, and travelers upon which, it is a nuisance. As the city extends, such nuisances should be removed to the vacant grounds beyond the immediate neighborhood of the residence of the citizens. This public policy, as well as the health and comfort of the population of the city, demands."

We do not think that there was any error in the refusal of the instruction last referred to.

The judgment of the appellate court is affirmed.

NUISANCES — GUNPOWDER. — Keeping a large quantity of gunpowder in a wooden building near other buildings amounts to a nuisance, for which the person so keeping it is liable for damages resulting therefrom, although he may not have been guilty of any negligence in causing the fire from which the damages resulted: *Myers v. Malcolm*, 6 Hill, 292; 41 Am. Dec. 744; *McAdams v. Collier*, 42 N. J. L. 189; 36 Am. Rep. 508. So where the owner of a stone quarry, by blasting with gunpowder, destroys the buildings of an adjoining land-owner, it is no defense to show that ordinary care was exercised in the manner in which the quarry was worked: *Tiffin v. McCormack*, 34 Ohio St. 638; 32 Am. Rep. 408. A powder-magazine may constitute a nuisance, even though it affects only the plaintiff: *Emory v. Harvard Powder Co.*, 22 S. C. 476; 53 Am. Rep. 730. The owner of a city lot blasting rock on his lot with gunpowder is liable for the natural and proximate injury to adjacent property, whether from contact of rock or from concussion: *Osborn v. Oonderdonk*, 69 Cal. 155; 58 Am. Rep. 556.

UNDERWOOD v. WOLF.

[181 ILLINOIS, 425.]

CONTRACTS — DAMAGES FOR NON-PERFORMANCE ON TIME. — One who contracts to complete certain work within a certain time is liable for not completing it within such time, unless prevented by the act or fault of the other party.

SALES — WARRANTY, BREACH OF. — If a party contracts to furnish certain apparatus guaranteed to be of certain quality and capability, the guaranty amounts to a warranty, and its non-fulfillment to a breach of warranty; and where, in such case, the apparatus is to be completed by a certain time, named and accepted, if the guaranty was fulfilled by another time named, it must be regarded that the period between the two times was to be used to test the apparatus to ascertain if it fulfilled the guaranty; and if it failed, the defects which would thus be shown to exist must be regarded as patent defects as contradistinguished from latent defects.

SALES — WARRANTY — RIGHT TO KEEP PROPERTY AND SUE FOR BREACH. — Where there is a sale and delivery of personal property *in presenti* with express warranty, and the property turns out to be defective, the vendee may receive the property and use it, and then sue for a breach of the warranty, or when sued for the purchase price, may recoup such damages under the general issue, or set them up in a special plea of set-off.

SALES — WARRANTY IN EXECUTORY CONTRACT — RIGHT TO RETAIN PROPERTY AND SUE FOR BREACH. — Where a contract is executory, with a warranty and time fixed for testing its fulfillment, the acceptance and use of the property after such time has passed is not a waiver of the right to claim damages for a breach of warranty, under the rule as established in Illinois.

SALES — WARRANTY IN EXECUTORY CONTRACTS, AND PROOF OF BREACH OF, IN REDUCTION OF DAMAGES. — Where a contract of sale is executory, with a warranty, the purchaser may, in all cases, in an action for its price or value, prove the breach of warranty in reduction of damages, and the sum to be recovered for the price of the article will be reduced by so much as it is diminished in value by non-compliance with the warranty.

SALES — BREACH OF WARRANTY IN EXECUTORY CONTRACT — BURDEN OF PROOF. — Where the vendee in an executory contract relies upon a breach of warranty as a defense or by way of set-off in an action for the purchase price, the burden of proof is on him to show the breach and the actual damages resulting, and such damages do not include probable profits or prospective gains.

SALES — BREACH OF WARRANTY IN EXECUTORY CONTRACT — RIGHT TO RESCIND OR SET OFF DAMAGES IN ACTION FOR PRICE. — Where a contract of sale is executory, with a warranty, and the time for examination, whether fixed by the contract or allowed by law, has passed, the buyer may refuse to accept the goods and return them, or he may accept them and sue for a breach of the warranty, or rely upon the damages for such breach in reduction in an action for the contract price. But if he rescinds and returns the goods, he must offer them back as soon as he discovers the breach, or after he has had a reasonable time for their examination. The right to rescind is waived by retaining and continuing the use of the goods longer than is necessary for a trial of them.

SALES — BREACH OF WARRANTY — RIGHT TO RECOUP DAMAGES IN ACTION FOR PRICE. — When personal property is sold under an executory contract with warranty, the purchaser may recoup damages for a breach of the warranty in an action for the price, although he retained the property after knowledge of the defect.

SALES — BREACH OF WARRANTY IN EXECUTORY CONTRACT — ACCEPTANCE — RIGHT TO RECOVER DAMAGES. — Where goods are sold under an executory contract with warranty, there may be an acceptance of them in full discharge of the contract; or there may be an acceptance in such sense that the buyer retains and uses them and becomes invested with the title and ownership, but reserves the right to claim damages for a breach of the warranty, or to recoup them in an action for the price.

SALES — BREACH OF WARRANTY IN EXECUTORY CONTRACT — RIGHTS OF PURCHASER. — When the time for examining an article sold under an executory contract with warranty is extended by agreement of the parties, whatever the purchaser was required to do during the original time in the way of rejecting or accepting the article he may do during the time as extended, without affecting his right to accept the article in full discharge of the contract, or with the reserved right to claim damages for the breach of the warranty, or to recoup them in an action for the price.

ACTION to recover the contract price of certain refrigerator-machines and attachments furnished and set up under a contract which is sufficiently stated in the opinion. Plea of the general issue and set-off for damages for non-fulfillment of the guaranties in the contract. Judgment for plaintiff, and defendants appeal.

Dexter, Herrick, and Allen, and C. H. and C. B. Wood, for the appellants.

Hamline and Scott, for the appellee.

MAGRUDER, J. The contract bears date February 8, 1886. By its terms the appellee was to furnish and erect the refrigerating machinery, with engine, pump, pipes, etc., in the packing-house of the appellants, and have the same in complete working order by the eighth day of May, 1886. The evidence tends to show that the whole plant was not ready for use until the first day of July, 1886.

The evidence further tends to show that the appellants were carrying on their packing business while the appellee was putting in the machinery. The appellee claims that the conduct of the business under such circumstances necessarily interfered with his work and delayed its progress. He also claims that delay was caused by the failure of the appellants to prepare, in proper time, the room in which the machinery was to be erected.

Whether the delay in the completion of the plant was due

to the fault of the appellee or to that of the appellants was a question of fact to be determined by the jury under proper instructions from the court. We see no objection to the tenth instruction given for the defendants below, as modified by the court. It told the jury that "under the contract in evidence the plaintiff was bound to complete the whole plant in complete working order and condition within ninety days from the eighth day of February, A. D. 1886, *unless prevented by the acts or fault of the defendants*; and if the evidence shows that he did not do it, then he is liable in this action to the defendants for any damages the evidence may show they have sustained by reason of such delay." This instruction was given as asked by the defendants, except that the words in Italics were added by the court. It was proper to add the words in question, because the contract required the defendants to furnish a room, foundations, masonry, carpenter-work, and all steam and feed and discharge water connections, and to properly insulate the rooms according to plans, etc., and if delay resulted from their failure to meet these requirements, the plaintiff certainly could not be held responsible. The jury found in his favor upon this question, and the judgment of the appellate court forbids us to disturb the finding.

But the main controversy between the parties arises upon the following provision in the contract: "And it is further agreed . . . that if the machines have fulfilled the guaranties made for them in this agreement by 1st of September, 1886, then said party of the second part [appellants] shall accept the same; and all payments to be made after the payment to be made on July 1, 1886, shall be promissory notes dated on the day of acceptance of the plant, with interest after maturity." The defendants refused to give and have never given the notes thus provided for.

What are the guaranties which were to be fulfilled? The plaintiff, Wolf, agreed and guaranteed that the machine would maintain certain degrees of cooling temperature in certain rooms in the packing-house, and would cool the rooms within a certain specified time; that it would cool a certain number of hogs of a specified weight within a specified time; that the power required to drive the machinery should not exceed a certain limit; that the fuel required to produce the steam to do the work of the engines should not exceed a certain amount; that the loss of ammonia in doing the work should not exceed a certain number of pounds; that the refrigerating-machines

should be of the best material and workmanship; that the engine should be capable of running the packing-house machinery in addition to the compressors; that the iron piping to be furnished should be such as would be necessary to carry and convey the brine required for the proper cooling of the rooms.

In considering the nature of these guaranties, it is unnecessary to discuss any nice distinctions between warranties on the one side, and conditions precedent or descriptions of the property on the other. It is sufficient that the guaranties are treated as warranties, and their non-fulfillment, if they were not fulfilled, will be regarded as a breach of warranty.

Inasmuch as the plant was to be completed by May 8, 1886, and was to be accepted if the guaranties were fulfilled by September 1, 1886, it is manifest that the period between these two dates was to be made use of for the purpose of testing the machines, in order to ascertain whether or not they were such as they were guaranteed to be. It is also sufficiently manifest that if the machines failed in any of the particulars named in the guaranties, the defects which would thus be shown to exist must be regarded as patent defects as contradistinguished from latent defects.

Where there is a sale and delivery of personal property *in presenti* with express warranty, and the property turns out to be defective, the vendee may receive and use the property, and sue for damages on a breach of the warranty, or when sued for the purchase price, he may recoup such damages under the general issue, or set them up in a special plea of set-off. This is a well-settled rule. In the present case, the contract is executory; the title to the property did not vest in the purchaser until the period for making the test had passed. It has been held in some states that where the contract is thus executory, and a time is fixed for making a test, the acceptance and use of the property after such time has passed amount to a waiver of the right to claim damages for a breach of the warranty. But such is not the law in this state. In the present case, the evidence tends to show that the defendants took possession about July 1, 1886, of the machines placed in their packing-house by the plaintiff, and had been using the same up to the time of the trial of the cause in the court below. The chief complaint of the appellants is, that under the instructions given by the trial court the jury were led to regard the acceptance and use of the machinery by the defendants

as an abandonment of all right to damages for breach of the warranties. We are unable to regard this complaint as well founded.

We agree with the counsel for appellants, in the main, in their view of the law. We think that even where the contract is executory the claim for damages on account of a breach of the warranty will survive the acceptance of the property. Chitty on Contracts, 11th ed., at page 652, says: "Where, therefore, the vendor of a warranted article, whether it be a specific chattel or not, sues for the price or value, it is competent to the purchaser, in all cases, to prove the breach of the warranty in reduction of damages, and the sum to be recovered for the price of the article will be reduced by so much as the article was diminished in value by non-compliance with the warranty." The previous discussion of the authorities by the author, before arriving at the conclusion thus announced, shows his meaning to be, that the breach of the warranty may be proven in reduction of damages, not only in the case of the sale of a specific chattel, but also in the case of an executory contract; as, for example, "where an article is ordered from a manufacturer who contracts that it shall be of a certain quality or fit for a certain purpose": Chitty on Contracts, 11th ed., 647-652.

In Benjamin on Sales (vol. 2, sec. 1356, 4th Am. ed.) it is said: "The buyer will also lose his right of returning goods delivered to him under a warranty of quality, if he has shown by his conduct an acceptance of them, or if he has retained them a longer time than was reasonable for a trial, or has consumed more than was necessary for testing them, or has exercised acts of ownership, as by offering to resell them; all of which acts show an agreement to accept the goods, but do not constitute an abandonment of his remedy by cross-action or by counterclaim in the vendor's action for the price." If the retention of the property by the buyer for a longer time than is reasonable for a trial does not waive his right to damages in an action by the vendor for the purchase price, then there is no reason why his retention of the property for a longer time than that fixed in the contract for a trial should amount to such waiver.

The rule, as announced by these text-writers, has been held to be the law in this state.

In *Babcock v. Trice*, 18 Ill. 420, 68 Am. Dec. 560, there was an executory contract for the sale and delivery of corn, with



an implied warranty that it should be of a fair and merchantable quality. It was there said: "It is true that the acceptance of corn under an executory contract, with opportunity of inspection at the time of delivery, without complaint, may raise a presumption that it was of the quality contemplated by the parties, but it will not preclude the party from showing and setting up the actual defect in quality and condition. . . . He could, . . . under the general issue, prove the facts out of which the warranty arose, the breach, and his damages by way of recoupment," etc.: *Crabtree v. Kile*, 21 Ill. 184.

In *Strawn v. Cogswell*, 28 Ill. 457, which was a petition for a mechanic's lien founded upon a contract to furnish iron castings for a grist-mill, and where the defense was, that the work was not done in a workman-like manner, and the materials were not of the quality required by the contract, we said: "Improvements of this description being permanent and fixed, and requiring skill to test their sufficiency, their being received and put to use is not such an acceptance as estops the party from claiming damages for their being defective."

In the case at bar, the refrigerating-machines were so built into the packing-house and so much a part thereof that their removal could only have been accomplished with difficulty, and perhaps with injury to the house itself. The mere use of them by the defendants after September 1, 1886, might not of itself amount to such an acceptance as would preclude them from claiming damages for defects: *Mears v. Nichols*, 41 Ill. 207; 89 Am. Dec. 381; *Peck v. Brewer*, 48 Ill. 54.

In *Doane v. Dunham*, 65 Ill. 512, 79 Ill. 131, the distinction between executory and executed contracts was recognized, and it was held that in the former the law gives the buyer a reasonable time for making an examination of the chattels sold; that it is for the jury to determine, under all the circumstances, what is such reasonable time; that a failure to make the examination within a reasonable time may preclude the buyer from offering the property back, rescinding the contract, and avoiding payment on that ground, but will not deprive him of the right to rely upon the breach of the warranty for damages. The only difference between that case and the one at bar is, that there the law gives time for examination or test, while here the contract fixes the time. The same rule, however, will apply to both cases: *Estep v. Fenton*, 66 Ill. 467.

In *Owens v. Sturges*, 67 Ill. 366, it was held that where the

contract is unexecuted, the buyer may retain the property, and show the warranty and breach, to reduce the recovery, even though he neglected to return the property upon discovery of the breach.

In *Prairie Farmer Co. v. Taylor*, 69 Ill. 440, 18 Am. Rep. 621, the contract was, to set up a printing-press in complete running order in the defendant's press-room within seventy days from the acceptance of the plaintiff's proposition, with warranty that the press should give complete satisfaction, and granting to the defendant thirty days' time from the setting up of the press to decide whether the warranty was good; the defendant gave no notice of its intention after the thirty days had passed, but kept the press; it was held that the continued use of the press indicated the vesting of the title in the buyer, and that the defendant could recoup his damages from the contract price if there had been a breach of the warranty.

We are therefore of the opinion that the defendants had a right, in the case at bar, to offset, against plaintiff's claim for the contract price of the machines, such damages as they were able to show that they had sustained from a failure to fulfill the guaranties, if there was such failure.

The subject presents itself under two aspects: 1. Were the machines such as they were warranted to be in the contract? 2. If they were not such as they were warranted to be, was there such an acceptance of them as would preclude the defendants from insisting upon damages for the breach?

The case seems to have been tried mainly upon the theory suggested by the first question. The plaintiff introduced proof to show that the machines did fulfill the guaranties, while the defendants produced evidence to show that they did not fulfill the guaranties. In other words, the question most prominently presented to the minds of the jury was, not whether there had been a waiver of existing defects, but whether or not any defects actually existed. Upon the latter subject they were most fully and elaborately instructed by the court. The court gave nine or ten instructions, asked by the defendants, authorizing the jury to give them damages for the breach of the warranties if the jury should find from the evidence that the machines did not fulfill the guaranties. These instructions all adopt and express the theory of the law contended for by the counsel for appellants. They announce, over and over again, that the defendants were entitled to damages if the

machines were not what they were warranted to be as to cooling capacity for rooms and hogs, as to amount of power and fuel and piping, etc., and as to every other particular specified in the contract. The jury, by their verdict, and the appellate court, by their judgment of affirmance, have found the fact to be that the defendants had not suffered the damages claimed by them. Hence such fact is settled beyond our power to change it.

But counsel say that the instructions given for the defendants, although announcing a correct rule of law, were contradicted by the instructions given for the plaintiff, and that the jury were left at liberty to follow either of two sets of contradictory instructions, unenlightened as to what the law really was. We do not think that the instructions, taken as a whole, can be regarded as laying down contradictory principles. Certainly no instruction given for the plaintiff states that the defendants were not entitled to damages for breach of the warranties. On the contrary, several of them expressly recognize the right of the defendants to claim damages.

The fourth instruction given for the plaintiff told the jury that so far as the defendants relied upon a breach of warranty as a defense, or by way of set-off, the burden of proof was upon them "as to such breach and as to any damages, if any, arising therefrom, and unless they prove such breach and damages as alleged by them, by a preponderance of the evidence, then they will not be entitled to any benefit therefrom in this suit." This language most clearly conveys the idea that if the defendants did prove the breach and damages by a preponderance of the evidence, they would be entitled to the benefit thereof.

The fifth of plaintiff's instructions told the jury that damages for breach of warranty of machinery did not include probable profits or prospective gains, thereby implying that such damages as did not include probable profits or prospective gains might be recovered.

The first instruction given for the plaintiff, in reciting the conditions upon which the plaintiff would be entitled to recover interest upon the notes, uses these words: "The court instructs the jury that if they believe from the evidence that the plaintiff has made out his case as by him alleged in his declaration," etc. The plaintiff in his declaration alleges that he has furnished machines, tanks, engine, piping, etc., of such description, quality, and capacity as the contract calls for, and

that he has kept the contract in all things on his part, and performed all the covenants therein within the time and in the manner therein provided. In other words, the first instruction requires the jury to find, as a condition of recovery, that the plaintiff has fulfilled all the guaranties above specified. This requirement negatives the idea that the defendants, by acceptance or other acts, had waived their right to claim damages for a non-fulfillment of the guaranties.

The obscurity which seems to exist in one or two of the instructions given for the plaintiff will disappear upon considering the true meaning of some of the terms therein used.

Where the contract for the sale of the goods is an executory one, and the time for examination, whether fixed by the contract or allowed by the law, has passed, the buyer may refuse to accept the goods and may return them, or he may accept them and sue for breach of warranty, or rely upon the damages for such breach in reduction of the contract price: 2 Benjamin on Sales, 4th Am. ed., secs. 1346-1348, etc.; *Doane v. Dunham*, 65 Ill. 512; 79 Ill. 131; *Owens v. Sturges*, 67 Ill. 366; *Mears v. Nichols*, 41 Ill. 207; 89 Am. Dec. 381. If he desires to rescind the contract and return the goods, he must offer them back as soon as he discovers the breach, or after he has had a reasonable time for examination; such right to rescind and return is waived by retaining and continuing to use the goods longer than is necessary for a trial of them.

There is some evidence tending to show that Viles, one of the defendants, requested the plaintiff to remove the machine. Such request, if made, would indicate an intention on the part of the defendants not to accept the machine, but to rescind the contract. Hence no harm was done by giving the plaintiff's eighth instruction. That instruction merely told the jury that the right of the buyer to reject the article sold to him, or in other words, his right to return it and rescind the contract, might be waived or lost by acts inconsistent with the ownership of the vendor or by the continued use of the article after knowledge of the defects. But the impression was in no way conveyed to the minds of the jury that if defendants elected to accept the machine, and not to return it, their right to offset damages for breach of warranty against the contract price would be waived by such acts and such continued use as are specified in the instruction. Waiver of the right to return the machine is one thing; waiver of the right to claim damages is another and entirely different thing. The third instruction

given for the defendants expressly told the jury that "the defendants were not bound to return the said machines and apparatus, if found not to be according to the warranty, but might keep the same, and when sued for the price, set up such warranty and the breach thereof as a defense, and if proven, be allowed the amount of damages they have sustained by reason of the breach of the warranty."

It is also to be observed that the word "acceptance," as used in reference to the subject-matter of this controversy, has two significations. Where goods are sold under an executory contract, there may be an acceptance of them in full discharge of the contract, or there may be an acceptance of them in such sense that the buyer retains and uses them, and becomes vested with the title and ownership of them, but reserves the right to claim damages for their defects. This distinction is recognized in *Estep v. Fenton*, 66 Ill. 467, and in *Mears v. Nichols*, 41 Ill. 207; 89 Am. Dec. 381. It is also recognized in the fourth instruction given for the defendants in this case, which told the jury that "the defendants are not prevented from setting off the damages they may have sustained by reason of the performance of the contract in a manner different from the agreement merely because they may have done acts amounting to an acceptance of the machine. They could only be prevented from setting off such damages so sustained in case they had accepted the machine in full discharge of the contract." So, also, the seventh instruction given for the plaintiff contains these words: "If the jury shall believe from the evidence that, prior to the bringing of this suit, defendants did accept said machine in full discharge of the contract, then the jury are instructed that defendants are not entitled to set off or recover in this action any damages resulting to them, if any, by reason of plaintiff's failing to meet the guaranties made by him in said contract." Under these and other instructions that were given, the jury could not have been led to believe that the right of the defendants to claim damages for breach of the warranties was cut off or waived by any other kind of acceptance than an acceptance in full discharge of the contract.

As to the second and sixth instructions and the first part of the seventh instruction given for the plaintiff, it may be said of them, as was said in *Village of Sheridan v. Hibbard*, 119 Ill. 307: "It is an error to suppose that every instruction asked by a plaintiff must, without regard to the office or purpose

it is intended to subserve, have embodied in it every fact or element essential to sustain the plaintiff's action, nor is it necessary to negative matters of mere defense."

The second instruction simply stated the amount which plaintiff would be entitled to by the terms of the contract, if he was entitled to recover at all; it by no means excluded or negatived the right of the defendants to offset against such amount the damages which they might succeed in proving.

The sixth instruction and the first sentence of the seventh intended to call the attention of the jury to the time allowed to the defendants for the purpose of testing the machine. Therein the jury were told that if the time for making the test, which by the terms of the contract expired on September 1, 1886, was extended beyond that date by arrangement between the parties, then whatever the defendants were required to do by September 1, 1886, either in the matter of rejecting the machine or of accepting it, — whether such acceptance should be in full discharge of the contract, or with a reservation of the right to offset damages for breach of the warranties, — they might do at the expiration of the period as thus extended. There was nothing in the language used that could by any possibility have been construed as a denial of the right to claim damages for a failure to fulfill the guaranties.

We perceive no such error in the record as will justify us in reversing the judgment.

The judgment of the appellate court is affirmed.

SALES. — RIGHT TO RECOVER DAMAGES for the breach of an express warranty of quality survives the acceptance of the goods by the vendee, whether the sale be regarded as executory or *in presenti*. The vendee is under no obligation to return the goods: *Fairbank Canning Co. v. Metzger*, 118 N. Y. 260; 16 Am. St. Rep. 753, and note; *Shupe v. Collender*, 56 Conn. 489. Compare *Pierson v. Crooks*, 115 N. Y. 539; 12 Am. St. Rep. 831.

SIEGEL, COOPER, & Co. v. CHICAGO TRUST AND SAVINGS BANK.

[181 ILLINOIS, 569.]

NEGOTIABLE INSTRUMENTS — PROMISSORY NOTE — CONSIDERATION. — A written promise to pay a certain sum of money at a day certain for a consideration thereafter to be rendered, is a valid promissory note, and depends for its validity upon the implied promise of the payee to furnish the consideration at the time and in the manner stipulated.

NEGOTIABLE INSTRUMENTS — PROMISSORY NOTE — RECITAL OF CONSIDERATION AS AFFECTING NEGOTIABILITY. — The mere fact that the consideration for which a note is given is recited in it, although it may appear thereby that it was given for and in consideration of an executory contract or promise on the part of the payee, will not destroy its negotiability, unless it appears through the recital that it qualifies the promise to pay, and renders it conditional and uncertain, either as to the time of payment or the sum to be paid.

NEGOTIABLE INSTRUMENTS. — **NEGOTIABILITY OF NOTE** received before maturity, and before a failure of consideration, is not affected by the fact that the consideration was to be thereafter realized, or that from some contingency it might never be enjoyed.

NEGOTIABLE INSTRUMENTS — RECITAL OF CONSIDERATION IN NOTE AS AFFECTING NEGOTIABILITY. — Where a note recites the consideration upon which it rests, an indorsee taking it before maturity is chargeable with notice of such recital. The recital is not, however, sufficient, of itself, to advise him that there was, or necessarily would be, a failure of consideration; still, if at the time of the indorsement the consideration had in fact failed, the recital might be sufficient to put him on inquiry, and, in connection with other facts, amount to notice.

NEGOTIABLE INSTRUMENTS — TIME OF PAYMENT OF NOTE AS AFFECTING NEGOTIABILITY. — If the parties insert a specific day of payment in a note, it is then payable at all events, and its negotiability is not affected, although an uncertain and different time of payment is also inserted.

NEGOTIABLE INSTRUMENTS. — **CONDITION IN NOTE POSTPONING TIME OF PAYMENT** until the happening of some uncertain or contingent event will destroy its negotiability; but if the maker promises to pay a sum certain at a specified day to a designated person, it is then negotiable, though it also contains a recital of the consideration upon which it is based, and the latter, if executory, may not have been performed.

John C. Richberg, for the appellants.

Flower, Smith, and Musgrave, for the appellee.

SHOPE, J. This was an action of *assumpsit*, by appellee, against appellants, upon the following instrument: —

"\$300.

CHICAGO, March 5, 1887.

"On July 1, 1887, we promise to pay D. Dalziel, or order, the sum of three hundred dollars, for the privilege of one framed advertising sign, size — x — inches, one end of

each of one hundred and fifty-nine street-cars of the North Chicago City Railway Company, for a term of three months from May 15, 1887. SIEGEL, COOPER, & Co."

Which was indorsed by Dalziel, the payee, to appellee, for value, on the day of its execution.

The first question presented is, Is this instrument negotiable? and this question has been answered affirmatively by the circuit and appellate courts. The appellate court having affirmed the judgment in favor of the plaintiff, the case is brought here by appeal, upon certificate of importance granted by that court.

It appears that before the time when the privilege of advertising was to commence, Dalziel forfeited any right he may have acquired to use the cars in the manner indicated, and the privilege specified never was furnished appellants; and it is insisted that the instrument is a simple contract only, and that therefore the same defense — failure of consideration — is available against the indorsee of the paper for value, and before due, as might be interposed against such paper in the hands of the payee. It is also insisted that the instrument shows, on its face, that payment depended upon a condition precedent to be performed by the payee, and therefore the indorsee took it with notice, and by the failure of the payee to perform the condition, no right of recovery exists in the indorsee. It is not contended that the indorsee had any other notice than that contained in the instrument itself, and it is apparent that at the time of its indorsement, which was the day of its execution, no right to the consideration had accrued to the makers. It is a promise to pay a certain sum of money at a day certain, for a consideration thereafter to be rendered, and depends for its validity upon the implied promise of the payee to furnish the consideration at the time and in the manner stipulated; that is, it is a promise to pay a sum certain on a particular day in consideration of the promise of the payee to do and perform on his part. A promise is a valuable consideration for a promise.

But the question remains, whether the statement or the recital of the consideration on the face of the instrument impairs its negotiability, and in this instance amounts to a condition precedent. The mere fact that the consideration for which a note is given is recited in it, although it may appear thereby that it was given for or in consideration of an executory contract or promise on the part of the payee, will not

destroy its negotiability, unless it appears, through the recital, that it qualifies the promise to pay, and renders it conditional or uncertain, either as to the time of payment or the sum to be paid: *Daniel on Negotiable Instruments*, secs. 790-797; *Davis v. McCready*, 17 N. Y. 230; 72 Am. Dec. 461; *State Nat. Bank v. Cason*, 39 La. Ann. 865; *Goodloe v. Taylor*, 13 N. C. 458; *Stevens v. Blunt*, 7 Mass. 240.

In *State Nat. Bank v. Cason*, 39 La. Ann. 865, it is said: "Plaintiff received the note before maturity, and before a failure of the consideration. Even if it were known to him that the consideration was future and contingent, and that there might be offsets against it, this would not make him liable to the equities between the defendant and the payee. It cannot affect the negotiability of a note that its consideration is to be hereafter realized, or that, from contingency, it may never be enjoyed."

The most that can be said of a recital in the instrument itself, of the consideration upon which it rests, is, that the indorsee taking it before maturity is chargeable with notice of the recital. Such recital, however, is not sufficient, of itself, to advise him that there was, or would necessarily be, a failure of consideration, but if, at the time of the indorsement, the consideration has in fact failed, the recital might be sufficient to put him upon inquiry, and, in connection with other facts, amount to notice: *Henneberry v. Morse*, 56 Ill. 394. The case at bar does not, however, fall within the rule just stated; for the assignment was made the same day the note was made, and by the terms of the recital it was apparent the payee was required to do no act till the 15th of May following, — an interval of seventy days.

There is a distinction, clearly recognized in the authorities, between an instrument payable at a particular day, and one payable upon the happening of some event; and the rule is, that where the parties insert a specific date of payment, the instrument is then payable at all events, and this although, in the same instrument, an uncertain and different time of payment may be mentioned, as that it shall be payable upon a particular day, or upon the completion of a house, or the performance of other contracts, and the like: *McCarty v. Howell*, 24 Ill. 341, and authorities *supra*. But the doctrine of this and kindred cases, where there are both a certain day of payment and one more or less contingent, need not be here invoked; for the time of payment in the instrument under con-

sideration is not made to depend upon the happening or not happening of any event, but is specific and certain, and must occur by the efflux of time, alone.

If, therefore, it be conceded, as it must, that a condition inserted in a promissory note, postponing the day of payment until the happening of some uncertain or contingent event, will destroy its negotiability, and render the instrument a mere agreement, yet under the authorities, if by the instrument the maker promises to pay a sum certain at a day certain to a certain person or his order, such instrument must be regarded as negotiable, although it also contains a recital of the consideration upon which it is based, and although it further appear that such consideration, if executory, may not have been performed. Here the money was payable, absolutely, on the first day of July, 1887, — a time when the contract for the advertising could not have been completed. If the instrument had remained the property of the payee, and upon its maturity and performance to that time suit had been brought, it is clear that no plea of partial failure of consideration could have been sustained, for the reason that the entire term had not then expired. No analysis of the instrument itself is necessary. The most careful examination of it will fail to disclose a condition precedent to the payment of the money at the time stipulated. Nor is there anything in the recital of the consideration to put the indorsee upon inquiry at the time the indorsement was made. Indeed, it is clear that at that time no inquiry would have led to notice that Dalziel would fail to comply with his contract on the 15th of May thereafter, when the term was to commence. All that the recitals would give notice of was, that the note was given in consideration of an agreement on the part of the payee that the privilege of advertisement named should be enjoyed by the makers for three months from May 15, 1887. Giving to the language employed its broadest possible meaning, it cannot be construed as notice to the indorsee of the future breach of the contract by Dalziel. The presumption of law would be, that the contract would be carried out in good faith, and the consideration performed as stipulated. The makers had put their promissory note into the hands of Dalziel upon an expressed consideration which they were thereafter to receive, and for the performance of which they had seen fit to rely upon the undertaking of Dalziel, and we are aware of no rule by which they can hold this indorsee for value, before

due and before the time of performance was to begin, chargeable with notice that the promise upon which the makers relied would not be kept and performed: *Wade on Notice*, sec. 94 a; *Loomis v. Mowry*, 8 Hun, 312; *Davis v. McCready*, 17 N. Y. 230; 92 Am. Dec. 461.

It is also contended that the court erred in giving the eighth instruction in behalf of appellee, as to the meaning of the words "good faith." Without pausing to discuss the instruction, we think it clear that appellants were not prejudiced thereby, and that no inference unfavorable or prejudicial to them could have been drawn therefrom by the jury. While, therefore, the instruction may be regarded as inaccurate, it worked no injury, and appellants cannot complain: See *Comstock v. Hannah*, 76 Ill. 530.

Other minor objections are urged, which, it is sufficient to say, we have examined with care, but find no prejudicial error.

The judgment of the appellate court will be affirmed.

PROMISSORY NOTES — CONSIDERATION. — An executory contract may be the consideration of a promissory note: *McGowan v. West*, 7 Mo. 569; 38 Am. Dec. 468; *Long v. Allen*, 2 Fla. 403; 50 Am. Dec. 281.

POSTAL TELEGRAPH CABLE COMPANY v. LATHROP.

[121 ILLINOIS, 575.]

APPEALS — REVIEWING EVIDENCE. — The supreme court may examine the evidence for the purpose of deciding as to the correctness of instructions or whether or not there was any evidence tending to support a material element in the cause of action or defense; but it cannot examine evidence to determine whether the lower court found correctly as to the facts in issue, respecting which the evidence was conflicting, nor can it examine the opinion of that court to ascertain what the facts were found to be.

TELEGRAPH COMPANIES — LIABILITY FOR MISTAKE IN TRANSMISSION OF MESSAGE. — If a message as written, read in the light of a well-known usage in commercial correspondence, reasonably informs the operator that the message is one of business importance, and discloses the transaction so far as is necessary to accomplish the purpose for which it is sent, the company is liable for all direct damages resulting from a negligent failure to transmit it as written within a reasonable time, unless such negligence is in some way excused. The message need not on its face disclose the nature of the business so that the operator may understand its meaning as to the article, quantity, quality, or price.

INSTRUCTIONS RATHER IN THE NATURE OF A RÉSUMÉ OF THE EVIDENCE and an argument, than concise statements of law, should be refused.

CASE to recover damages for a mistake in the transmission of a telegraphic message. The message, as written and received by the company, read as follows:—

“W. H. CROSSMAN & BRO.—Put stop-order on five thousand December at seventeen cents. This order good until countermanded. C. D. LATHROP & Co.”

The message as transmitted and delivered read as follows:—

“W. H. CROSSMAN & BRO.—Put stop-order on five thousand December at seventy cents. This order good until countermanded. C. D. LATHROP & Co.”

The other facts are stated in the opinion. Judgment for plaintiffs, and defendant appeals.

James L. High, for the appellant.

Dexter, Herrick, and Allen, for the appellees.

WILKIN, J. It seems to be thought by counsel for appellant that, notwithstanding the judgment of affirmance in the appellate court, controverted questions of fact may still be reviewed in this court, because, as is said, the appellate court has not expressly found, in terms, against appellant on these questions, and because portions of its opinion are inconsistent with and negative the presumption of such a finding. This position is untenable. Sections 87 and 89 of our Practice Act, chapter 116, prohibit this court from re-examining controverted questions of fact in all cases of this kind. We may look into the evidence for the purpose of deciding as to the correctness of instructions, or, in a proper case, to determine whether or not there is any evidence tending to support a material element in the cause of action or defense. In such cases it becomes necessary to examine the evidence, in order to settle questions of law; but we have uniformly held that we cannot examine evidence to determine whether the appellate court found correctly as to the facts in issue: See *Montgomery v. Black*, 124 Ill. 62, and cases cited; *Commercial Nat. Bank v. Proctor*, 98 Ill. 561; *Darlington v. Chamberlin*, 120 Ill. 585; *Sangamon Coal Mining Co. v. Wiggerhaus*, 122 Ill. 281; *Hayes v. Massachusetts Mut. L. Ins. Co.*, 125 Ill. 631. We also said in *Coalfield Co. v. Peck*, 98 Ill. 145, that we could not look to the opinion of the appellate court to ascertain what that court found the facts to be.

The controlling question in the case, so far as we are at lib-

erty to pass upon it, arises on the refusal of the trial court to give the third instruction asked by appellant, as follows:—

“The jury are instructed that the defendant is only liable for such damages, if any, as were actually contemplated, or which might reasonably be supposed to have been contemplated, by the parties in the delivery and receipt of the messages in the transmission of which the alleged errors occurred. And if the jury believe, from the evidence, that such messages were not sufficiently clear or precise to inform the agents of the defendant receiving them, of their meaning, and of the possible risk and damage which might result from mistakes in their transmission, and that such facts were not disclosed by the plaintiffs to the defendant or its agent, then the defendant cannot be charged with having contemplated the special damages claimed by the plaintiffs in this action, and plaintiffs are only entitled to recover the amount actually paid by them for the sending of such messages, with interest at six per cent from the date of payment to the date of your verdict.”

It is earnestly contended by counsel for appellant, that the messages, “Please buy, in addition to thousand August, one thousand cheapest month,” and “Put stop-order on five thousand December, at seventeen cents,” were, unexplained, meaningless and unintelligible to the operator of appellant who transmitted them, and therefore, as in case of cipher dispatches, no special or consequential damages could have been reasonably contemplated by the parties when they were sent, and hence none can be recovered in this suit. This position is based on the rule of damages announced in *Hadley v. Baxendale*, 9 Ex. 341, and followed generally in this country as well as England. In any view of that rule, as applied to this case, the instruction is too narrow. The evidence shows that at the time of sending these dispatches, appellees were, and had for some time prior thereto been, engaged in the business of jobbers in coffee, tea, and sugar in the city of Chicago; that Crossman and Brother were commission merchants in New York, buying and selling coffee, rubber, and hides on commission; that appellant had a branch office near the place of business of appellees, from which the messages in question were sent, and had frequently sent others pertaining to their business. It also tends to show that from business transactions in New York between appellant and the firm of Crossman and Brother, appellant knew the business in which the latter firm was engaged. It is in proof that during the month of June,

1887, and prior to the first mistake complained of, a number of dispatches were sent by appellees to Crossman and Brother from appellant's Chicago office. One on the 13th read: "Please wire us to-day whether you do or do not execute our order for five thousand bags, as we must place it elsewhere if you decline." Another of the same date refers to "five thousand bags." It must at least be conceded that there is evidence tending to show that from their previous dealings appellant knew, or might by reasonable diligence have understood, the purport of these messages. Therefore, in determining whether or not the messages were sufficient to inform the operator of their meaning, and of the possible risk of loss to appellees by a mistake in transmitting them, the jury should have been left free to consider all the facts and circumstances proved in the case, bearing on that question, whereas the instruction limits the inquiry to that which appears in the dispatches themselves, and to such facts as may have been disclosed by the plaintiffs to the defendant or its agent at the time they were sent: See 2 Thompson on Negligence, 857.

On the question as to how far mere indefiniteness in the language of a message will defeat a recovery for consequential damages against a telegraph company, the decisions cannot be said to be harmonious. Counsel for appellant contends that the better line of authorities sustains the rule announced in this instruction, viz., that the operator who transmits a message must be able to understand its meaning as to quantity, quality, price, etc., as the sender and party to whom it is sent themselves understood it, otherwise it is said he cannot reasonably be supposed to have contemplated damages as the probable consequence of a failure to correctly transmit it. While some of the cases cited go to that extent, especially where the message is in cipher, another line of decisions, and, we think, founded on the better reasons, hold that where enough appears in the message to show that it relates to a commercial business transaction between the correspondents, it is sufficient to charge the company with damages resulting from its negligent transmission.

In *United States Tel. Co. v. Wenger*, 55 Pa. St. 262, 93 Am. Dec. 751, a message read: "Buy fifty (50) Northwestern, fifty (50) Prairie du Chien, limit forty-five (45)." There was a delay by the telegraph company in its delivery, resulting in a loss to the sender on account of the advance in price of Chicago and Northwestern Railway Company stock, and the Mil-

waukee and Prairie du Chien Railway Company stock, which the message was intended to order purchased. The supreme court of Pennsylvania sustained a recovery, saying: "The dispatch was such as to disclose the nature of the business to which it related, and that loss might be very likely to occur if there was a want of promptitude in transmitting it, containing the order."

In *Tyler v. Western Union Tel. Co.*, 60 Ill. 421, 14 Am. Rep. 88, the message was, "Sell one hundred (100) Western Union; answer price." The message as delivered read, "Sell one thousand (1,000)," instead of "one hundred (100)." The message was intended as an order to sell one hundred shares of stock in Western Union Telegraph Company. The agent, obeying the order as delivered, sold one thousand shares of said stock, and to fill the order, was compelled to buy nine hundred shares. We held that the plaintiff was entitled to recover the difference between the price for which the shares of stock were sold and that which he was compelled to pay for those purchased. On the question as to the sufficiency of the dispatch to inform the agent of the transaction to which it referred, so as to charge the telegraph company with resulting damages, the rule announced in *United States Tel. Co. v. Wenger*, 55 Pa. St. 262, 93 Am. Dec. 751, was approved, and it was held that the dispatch disclosed the nature of the business as fully as the case demanded. On a second appeal (*Western Union Tel. Co. v. Tyler*, 74 Ill. 168, 24 Am. Rep. 279) by general language, the decision is reaffirmed.

In *Telegraph Co. v. Griswold*, 37 Ohio St. 302, 41 Am. Rep. 500, a dispatch read: "Will you give one fifty for twenty-five hundred at London; answer at once, as I have only till to-night." As delivered, it read, "one five" instead of "one fifty." As written, it was an inquiry whether the sendee would pay \$1.50 in gold for two thousand five hundred bushels of flax-seed at London, Ontario, the parties having previously corresponded on the subject. The sendee replied to the dispatch as received, ordering the purchase, and he recovered from the telegraph company the difference in price. On appeal to the supreme court, it was contended, as it is here, that the message was indefinite, and therefore the recovery below unauthorized. But the court said: "It appeared upon its face that it related to a business transaction,—a transaction involving the purchase and sale of property. The company was therefore apprised of the fact that a pecuniary loss

might result from an incorrect transmission of the message. Where this appears, there is no such obscurity as relieves the company from liability for negligently failing to transmit and deliver a message in the language in which it was received."

In *Marr v. Western Union Tel. Co.*, 85 Tenn. 530, a message was delivered to the company reading, "Buy one hundred shares Memphis and Charlestown." As delivered, it read, "Buy one thousand shares Memphis and Charlestown." The recovery for consequential damages was sustained, the supreme court of that state saying: "This message was so written that the slightest reflection would enable the operator who undertook its transmission to see its commercial importance, and put him on his guard against error."

In *Western Union Tel. Co. v. Blanchard*, 68 Ga. 299, 45 Am. Rep. 480, the message sent read, "Cover two hundred September, one hundred August." By an error in its transmission, as received it read, "two hundred August," instead of "one hundred." As sent, it was an order to sell one hundred bales of cotton for August delivery, and two hundred for September delivery. The agent sold two hundred bales for August, and plaintiff was compelled to buy one hundred at a loss, in order to meet the sale. A recovery for this loss was sustained by the supreme court of that state in the following language: "As to the fifth ground in the request to charge, we do not see but what the message sought to be transmitted was, according to the proof, an ordinary commercial message, intelligible to those engaged in cotton-dealing, and we can see no special purpose intended by the sender which was unknown to the company, so as to vary the rule of liability. There was at least enough known to show it was a commercial message of value, and that is sufficient." See also *Squire v. Western Union Tel. Co.*, 98 Mass. 232; 93 Am. Dec. 157; *Pepper v. Western Union Tel. Co.*, 87 Tenn. 554; 10 Am. St. Rep. 699; *Sutherland on Damages*.

All the cases which hold that a telegraph company is not liable for consequential damages for a failure to transmit a dispatch as received, on the ground of indefiniteness or obscurity in the language of the message, do so upon the ground that unless the agent of the company may reasonably know from the message itself, or is informed by other means, that it relates to a matter of business importance, he cannot be supposed to have contemplated damages as a result from his failure to send it as written, as in the case of cipher dispatches.

The supreme court of Wisconsin, in *Candee v. Western Union Tel. Co.*, 34 Wis. 472, say: "The operator, who represents the company, and may for this purpose be said to be the other party to the contract, cannot be supposed to look upon such a message as one pertaining to transactions of pecuniary value and importance, and in respect to which pecuniary loss or damage will naturally arise in case of his failure or omission to send it. It may be a mere item of news, or some other communication of a trifling and unimportant character."

It is clear enough that applying the rule in *Hadley v. Barendale*, 9 Ex. 341, a recovery cannot be had for a failure to correctly transmit a mere cipher dispatch, unexplained, for the reason that to one unacquainted with the meaning of the ciphers it is wholly unintelligible and nonsensical. An operator would, therefore, be justifiable in saying it can contain no information of value as pertaining to a business transaction, and a failure to send it, or a mistake in its transmission, can reasonably result in no pecuniary loss. The messages in this case, however, are not cipher dispatches. Their language is plain and intelligible to every one who can read, so far as they purport to disclose the business to which they relate. They are abbreviations, and clearly indicate that they relate to business transactions between the sender and sendee. The first message, "Please buy, in addition to thousand August, one thousand cheapest month," was notice to the agent at Chicago that appellees were ordering their agents in New York to purchase merchandise for them. We do not agree with counsel in saying that it might as well be construed to be an order "for a thousand toothpicks or a thousand papers of pins, as anything else." Every one of intelligence knows that such articles are not purchased in that way. Suppose, however, that the agent was not informed as to the quantity, quality, and value of the merchandise to be purchased, by the message; would that justify him in contemplating, within the rule in the *Hadley* case, *supra*, no damages as a result of his negligence or omission of duty in promptly and correctly sending it forward? It certainly cannot be contended that the agent must be informed of all the facts and circumstances pertaining to a transaction referred to in a telegram, which are known by the parties themselves, to make his company liable for more than nominal damages. If it should be so held, the telegraph would cease to be of practical utility in the commercial world

It is not easy to state a case in which it can be said the parties contemplated, at the time of contracting, all the damages which would probably result from a failure to perform the contract. We think the reasonable rule, and one well sustained by authority, is, that where a message, as written, read in the light of well-known usage in commercial correspondence, reasonably informs the operator that the message is one of business importance, and discloses the transaction so far as is necessary to accomplish the purpose for which it is sent, the company should be held liable for all the direct damages resulting from a negligent failure to transmit it as written, within a reasonable time, unless such negligence is in some way excused. Under this rule, both dispatches, as presented to appellant's operator, were sufficiently explicit to charge it with the loss sustained by appellees, resulting from what has been found by the jury inexcusable mistakes.

Objection is also urged to the ruling of the circuit court in giving, modifying, and refusing other instructions; also in excluding certain evidence offered on behalf of the defendant below. We have examined these several points of objection, and think they are without substantial merit, unless it be as to the giving of the fourth and fifth instructions on behalf of plaintiffs. They are subject to just criticism. They violate a wholesome rule of practice announced in *Merritt v. Merritt*, 20 Ill. 80. They are very lengthy, are rather in the nature of a *résumé* of the evidence and an argument, than concise statements of the law, and for that reason should have been refused. But after having carefully compared them with the evidence, we cannot say that they are so unfair to appellant as to have misled the jury to its prejudice.

Finding no reversible error in the record, the judgment of the appellate court will be affirmed.

TELEGRAPH COMPANIES. — A telegraph company must take notice that the utmost brevity of expression is cultivated in correspondence by telegraph, and that that mode of communication is chiefly resorted to in matters of importance: *Western Union Tel. Co. v. Adams*, 75 Tex. 531; 16 Am. St. Rep. 920, and compare cases cited in note. As to the knowledge of the importance of the message as affecting the question of damages, see note to *Western Union Tel. Co. v. Cooper*, 10 Am. St. Rep. 785-788.

JOHNSON v. LEMAN.

[121 ILLINOIS, 609.]

TRUSTS — LIEN AGAINST TRUST ESTATE. — A claim for compensation by a person employed by a trustee to negotiate a loan for a trust estate without an order of court, but under promise from the trustee that the claim should be paid out of the trust fund, cannot be enforced against the trust estate, in the absence of insolvency on the part of the trustee or an agreement by him exempting himself from personal liability, making the claim a specific lien against the trust fund. The only remedy is against the trustee personally, or against his estate, in case of his death.

TRUSTS — LIEN FOR EMPLOYMENT AGAINST TRUST ESTATE. — As a general rule, the expenses of properly administering a trust are a lien on behalf of the trustee, on the estate in his hands, and he will not be compelled to part with his control of that estate until such expenses are paid. This lien, however, unless in exceptional cases, does not extend to persons employed by the trustee. Their only remedy for compensation is personal against the trustee employing them.

Peckham and Brown, and Tenney, Bashford, and Tenney, for the appellant.

William C. Wilson, David L. Zook, and W. T. Burgess, for the appellees.

SCHOLFIELD, J. Appellant's case, stated briefly, and in the most favorable view for him warranted by the record, is this: He was employed as a broker by the trustee of the Sherman House property in Chicago, to obtain a loan for the benefit of that trust. The best interests of that trust required that the loan should be obtained, and the trustee promised him that he should be paid for obtaining the loan a stipulated commission from the trust fund. He did all the work necessary to obtain the loan; but before the corporation from which the loan was to be obtained signified its formal acceptance of the terms proposed by him, the trustee by whom he was employed died. A subsequent trustee obtained the loan on substantially the same terms as those for which he had negotiated, and thus the trust had the fruits of his labor.

It is not alleged that the agreement between the trustee and the appellant was, that the trustee should not be personally liable to appellant upon their contract, or that the compensation for obtaining the loan should be a specific lien on the trust fund, or that the same was thereby assigned by the trustee to the appellant, nor is it alleged that the trustee was, or that his estate is now, insolvent. The question is, Does the claim of appellant for compensation for his services in obtaining the loan constitute a charge against the trust estate which

a court of equity will decree payment of out of that estate, the fund being ample, on bill filed by appellant?

The general rule is, that the expenses of properly administering a trust are a lien, on behalf of the trustee, on the estate in his hands, and he will not be compelled to part with his control of that estate until such expenses are paid. But this, unless it may be in exceptional cases, does not extend to persons employed by the trustee. In general, their only remedy for compensation is personal against the trustee employing them: *Hill on Trustees*, 4th Am. ed., 879, *567; *Lewin on Trusts*, 7th ed., 549; *Perry on Trusts*, sec. 907; *Tiffany and Bullard on Trusts*, 583; *Worrall v. Harford*, 8 Ves. 7, *8; *Heriot's Hospital v. Ross*, 12 Clark & F. 507; *Hall v. Saver*, 1 Hare, 570; *Francis v. Francis*, 5 De Gex, M. & G. 108; *In re Sadd*, 34 Beav. 650; *Jones v. Dawson*, 19 Ala. 672; *Fearn v. Mayers*, 53 Miss. 458.

It is manifestly irrelevant to notice cases where, the beneficiary of a fund in the hands of a trustee becoming indebted, it has been held the creditor may have satisfaction from the fund, as in *Frazier v. Brownlow*, 3 Ired. Eq. 237, 42 Am. Dec. 165, cited by counsel for appellant, since this is not the contract of the beneficiary of the fund, but of the trustee; nor are cases that might be cited, where it has been held that solicitors, etc., had a lien upon the amount realized to the estate in the case in which they had been employed, for their costs, because appellant is not a solicitor or attorney seeking the recovery of taxable costs, nor is he seeking the enforcement of a lien upon a specific fund brought to the estate through his endeavors. The borrowed money was paid out in satisfaction of previous loans, and appellant seeks recourse against any unappropriated trust funds of the estate.

Counsel for appellant cite and rely upon *Noyes v. Blakeman*, 6 N. Y. 567, and *New v. Nicoll*, 73 N. Y. 127, 29 Am. Rep. 111, as laying down a rule by which his claim may be sustained. Those cases certainly go, in the direction of his contention, much farther than any other cases of which we have knowledge, but if we were to concede that they are the law here, it is impossible that he could recover. In *Noyes v. Blakeman*, 6 N. Y. 567, the recovery was only sustained by a divided court, and then upon the ground that the agreement was that the trustee was not to incur any personal liability, and that the claim was to be paid out of the income of the trust estate. In *New v. Nicoll*, 73 N. Y. 127, 29 Am. Rep. 111, it is con-

ceded in the opinion that "the general rule undoubtedly is, that a trustee cannot charge the trust estate by his executory contracts, unless authorized to do so by the terms of the instrument creating the trust. Upon such contracts he is personally liable, and the remedy is against him personally." The court, however, adds: "But there are exceptions to this general rule. When a trustee is authorized to make an expenditure, and he has no trust funds, and the expenditure is necessary for the protection, reparation, or safety of the trust estate, and he is not willing to make himself personally liable, he may, by express agreement, make the expenditure a charge upon the trust estate. In such case he could himself advance the money to make the expenditure, and he would have a lien upon the trust estate, and he can, by express contract, transfer this lien to any other party who may, upon the faith of the trust estate, make the expenditure." And the court further adds: "It was not sufficient for him to show that he did the work upon the faith or credit of the trust estate. He could get a lien or charge upon the trust estate only by virtue of some agreement to that effect." It has been seen, there was here no agreement releasing the trustee from liability and assigning his lien to appellant, or otherwise creating a lien in behalf of appellant upon the trust estate.

We express no opinion whether, if the facts presented to us the precise case before the New York court, we should follow their ruling. It is sufficient that no such case now demands the expression of our opinion.

Counsel for appellant have also cited, in support of their contention, our decision in *Greene v. Grimshaw*, 11 Ill. 389. The question there originated in the probate court, and was, whether a claim presented by attorneys at law against an estate for professional services in an action at law, whereby assets of the estate were collected, should be allowed as a charge against the estate, and it was held that it should. The statute then in force provided that expenses of the settlement of the estate should be allowed against the estate in the second class: R. S. 1845, sec. 115, c. 110. It is true, the statute was not cited in the opinion, but the only controversy was, whether the judgment, in the recovery of which the attorney's services were rendered, was for the executrix personally or for the estate,—the controversy assuming that if for the latter, the estate was liable, and so there was no necessity for referring to the stat-

ute. The decision, therefore, has no bearing upon the question involved here.

It is earnestly insisted by counsel for appellant that the death of the trustee before the consummation of the negotiations to borrow money, the subsequent transfer of the trust property to another person acting as trustee, and the subsequent decision of the courts that the person with whom appellant contracted, and the person to whom the trust property was subsequently transferred, were not lawfully appointed trustees, are exceptional reasons to take the present case from without the operation of the general rule as stated *supra*. But it is manifest that that rule cannot logically be affected by these circumstances. If the trustee was liable individually, no rule of law is better settled than that his death did not terminate it. Nor could any possible reason exist why, if the estate was not liable when the contract was made, it should become liable by the fact of the subsequent death of the trustee. If the trust property was liable when the contract was made, it would be equally liable when transferred to a subsequent trustee. If it was not then liable, it is not possible to reasonably conceive of its being made liable by the mere act of subsequent transfer. If the validity of the appointment of the trustees cannot be inquired into in this case, then, beyond all question, it is immaterial how the courts have decided—or, indeed, whether they have decided at all—upon that question. If the validity of the appointment of the trustees can be inquired into in this case, it is not to be conceived that appellant's position can be strengthened thereby, since, if the act of a trustee would not, under the circumstances, have rendered the estate liable, much less could the act of a mere intermeddler, having no authority of law, have done so.

It is argued by counsel that the rule, however well adapted to the conditions of things in the days of Lord Eldon, is not adapted to the conditions of things to-day. It may be that trust estates are more numerous and the property values affected thereby are much greater now than they were then, but we do not perceive that these affect the reason of the rule. Lord Eldon said, in *Worrall v. Harford*, 8 Ves. 7, *8, that "it would be quite mischievous to allow every person with whom the trustees may contract to have an account of the whole administration of the estate; and, without such an account, such claimant could in no case have a decree against the

trust fund." It would seem obvious that the greater the estate, the more mischievous this would be. The rule can work no great hardship. If a trustee shall be unable to procure the services of the necessary agents upon his own responsibility, let him apply to the chancellor for permission to charge the estate specially for that purpose. In our opinion, the ends of justice will be best subserved by adhering to the rule.

The judgment is affirmed.

LIENS AGAINST TRUST ESTATES IN FAVOR OF CREDITORS OR TRUSTEES. —

It may be stated, as a general rule, that a trustee, express or implied, cannot, in the absence of statutory enactment to that effect, or of power especially conferred upon him by the instrument creating the trust, impose a liability upon the trust estate by any contract or engagement he may make. If he makes a contract which is beneficial to the estate, the person with whom he contracts has no legal nor equitable right to charge the estate, unless the trustee is insolvent, as shown by the exhaustion of legal remedies against him, and the trust estate is indebted to him. In other words, the contracts of trustees, though for the benefit of the trust estate, impose upon them a personal liability only, in the absence of an express provision to the contrary; and a person so contracting with the trustee cannot proceed directly, in the first instance, against the trust estate: *Jones v. Dawson*, 19 Ala. 672; *Wade v. Pope*, 44 Ala. 690; *Steele v. Steele*, 64 Ala. 438; 38 Am. Rep. 15; *Aakew v. Myrick*, 54 Ala. 30.

The contracts of guardians, administrators, or other trustees, though made in execution of the trust, and in the performance of a legal duty, impose upon them a personal liability only, and create no liability either against the trust estate or the beneficiary; but if the estate is indebted to the trustee on settlement of his accounts, and he is insolvent, as shown by the exhaustion of legal remedies against him, and the contract has inured to the benefit of the trust estate, a court of equity will subrogate the creditor to the trustee's right against the estate: *Mosely v. Norman*, 74 Ala. 422; *Blackhear v. Burke*, 74 Ala. 239; *Dickinson v. Conniff*, 65 Ala. 581.

In *Steele v. Steele*, 64 Ala. 451, 38 Am. Rep. 15, the court said: "The foregoing is the rule. It sometimes works great hardship; but the rule is necessary to save and protect trust estates from mismanagement, and sometimes faithlessness of trustees. Persons who deal with trustees, and extend them credit, as a rule, acquire no lien on or right to proceed against the trust estate in their hands. It is a matter of personal trust and confidence. True, if the trustee is in advance, and the trust fund is indebted to him, a creditor, after suing the trustee in insolvency, may have a remedy to reach and condemn such trust indebtedness. A trustee cannot create a charge on the trust fund, enforceable at the suit of a creditor, without express power and authority therefor."

For these reasons, persons dealing with a trustee on the faith of the trust estate are bound, at their peril, to take notice of the scope and extent of the trustee's powers, and the latter cannot bind or encumber, by contract or otherwise, the trust estate, except only so far as the power may be conferred or given by the instrument creating the trust: *Owen v. Reed*, 27 Ark. 122; *Vernon v. Board of Police*, 47 Miss. 181. Under this rule it has been decided that a trustee has no authority to create a lien upon the trust estate, or on

the crops to be grown thereon, for supplies furnished with which to make such crops: *Taylor v. Clark*, 56 Ga. 309; *Tift v. Mayo*, 61 Ga. 246.

In *Clopton v. Gholeon*, 53 Miss. 466, 471, the court said: "We had occasion in the recent case of *Fearn v. Mayers*, 58 Miss. 455, to declare that while trustees have a lien on the trust estate for all costs and expenses legitimately incurred by them in its administration, this privilege does not extend to agents employed by them, but such agents must look alone to the trustee for reimbursement. It follows from this that while a trustee who has paid or become responsible to parties legitimately employed by him in the business of the estate may retain the assets for his own reimbursement, yet if he does not do so, the parties employed by him are, ordinarily, powerless to assert any claim against the estate. A careful re-examination of the subject has strengthened our conviction of the soundness of this decision, both on principle and authority. If the trust estate was liable to be attached and impleaded by every person who had dealt with the trustee, and forced to litigate with them the nature, value, and beneficial character to the estate of the services alleged by them to have been rendered, it would be involved in endless litigation and complications, and be, perhaps, swallowed up or seriously injured by the accumulation of costs. The law therefore compels such persons to look to the trustee with whom they dealt, and against whom alone they have a legal demand. If their claim is recognized or enforced against him, he presents it to the proper tribunal, and with him the beneficiaries of the estate will litigate the question of the propriety of its allowance against themselves. The authorities on this point are almost, if not altogether, harmonious"; citing, in addition to some of the cases before noticed, *Worrall v. Harford*, 8 Ves. 4; *Mulhall v. Williams*, 32 Ala. 489; *Livingston v. Gruesen*, 21 La. Ann. 286; *Kessler v. Hall*, 64 N. C. 60; *Austin v. Muaro*, 47 N. Y. 260; *Guerry v. Capers*, Bail. Eq. 159; *Sims v. Sticksell*, 3 How. (Miss.) 176; *Woods v. Ridley*, 27 Miss. 119.

"It is evident that this principle applies with especial force to contracts entered into by executors and administrators. These functionaries have no authority to contract debts which shall primarily bind the estates committed to them, except in cases especially authorized by statute, and ordinarily such debts are obligatory only as personal obligations. This has repeatedly been held true of fees due attorneys for professional services in the management of estates, as was declared in the leading case of *Worrall v. Harford*, 8 Ves. 4, and in several of the cases above cited. It is true that under some circumstances attorneys or other creditors of the administrator may, under the principles of substitution and subrogation, reach the assets of the estate; but such relief must be based on the fact that the administrator himself either already has some claim against the estate, or would be entitled to one by a payment of the demand of the creditor, and that the latter is unable to obtain satisfaction from the administrator. If, for instance, a creditor can show that the consideration of his demand inured to the benefit of the estate, and is unpaid; that the administrator is non-resident or insolvent; has never received credit for it in his settlements; and that the estate is indebted to him, — in such case the creditor may, by a bill in chancery, have himself subrogated to the rights of the administrator against the estate, and to that extent have satisfaction of his demand out of the assets. Nor would it be necessary for him to show that the estate was actually indebted to the insolvent administrator. It would be sufficient if he should show that the estate would have been indebted if the administrator had paid the demand out of his private funds. Inasmuch as, in such a case, the administrator

ought to have paid it, and if he had done so would have been allowed a credit against the estate, a court of equity will consider that done which should have been done, and will give the creditor a decree against the estate, provided the administrator is not indebted to the estate, or would not thereby become so, and has not already received credit for the claim. Under such circumstances the creditor would obtain payment only for the beneficial services rendered to the estate, while it would be in no wise damaged."

In the subsequent case of *Norton v. Phelps*, 54 Miss. 461, the court said: "In the case of *Clopton v. Gholson*, 53 Miss. 466, we announced the principles applicable to this case. These are, that persons dealing with the trustee must look to him for payment of their demands, and that, ordinarily, the creditor has no right to resort to the trust estate to enforce his demand for advances made or services rendered for the benefit of the trust estate. But while this is the rule, there are exceptions to it; and where expenditures have been made for the benefit of the trust estate, and it has not paid for them, directly or indirectly, and the estate is either indebted to the trustee, or would have been if the trustee had paid, or would be if he should pay, the demand, and the trustee is insolvent or non-resident, so that the creditor cannot recover the demand from him, or will be compelled to follow him to a foreign jurisdiction, the trust estate may be reached directly by a proceeding in chancery. The principle is, that while persons dealing as creditors with the trustee must look to him personally, and not to the trust estate, yet where the estate has received the benefit of the expenditures procured to be made for it by the trustee, and it has not in any way borne the burden of these expenditures properly chargeable to it, and to fasten the charge upon it will do it no wrong, but simply cause it to pay what it is indebted for to the trustee, or would be liable for if he had paid it, or should pay it, and because of the insolvency or non-residence of the trustee, our tribunals cannot afford the creditor a remedy for his demand, he may proceed directly against the trust estate, and assert against it the demand the trustee could maintain, if he had paid or should pay the claim, and should himself proceed against the trust estate. Generally, the trustee alone must be looked to. He stands between the creditor and the estate. He represents the estate, and deals for it. He is entitled to be reimbursed out of the trust estate for all disbursements rightfully made by him on account of it, and creditors must get payment from him. But when they cannot do that, and it is right for the trust estate to pay the demand, and it owes it to the trustee, or would owe him if he had paid or should pay the demand, the rule, founded in policy, which denies the creditor access to the trust estate, yields to the higher considerations of justice and equity; and in order that justice may be done, the creditor may be substituted, as to the trust estate, to the exact position which the trustee would occupy if he had paid or should pay the demand and seek to obtain reimbursement out of the estate." The rule is thus laid down in *Hewitt v. Phelps*, 105 U. S. 393: Persons dealing with a trustee must look to him for payments of their demands, and, ordinarily, the creditor has no right to resort to the trust estate to enforce his claim. Still, where the estate is indebted to the trustee, or would be if he should pay the demand, and the trustee is insolvent or non-resident, the trust estate may be reached directly by a proceeding in chancery.

Under this exception to the general rule, the cost of improvements on a trust estate, made in reliance upon the estate, and followed by a promise by the trustee to pay for them, has been decided to be a proper charge upon it: *Field v. Wübur*, 49 Vt. 157. A trustee expressly authorized to make

expenditures necessary for the repair or protection of the trust estate, and having no trust funds on hand, may by express agreement exempt himself from liability therefor, and make the expenditure a lien upon the estate. But in the absence of such agreement, the trustee is individually liable, and he cannot, by mere subsequent promise to pay out of the estate, create a lien thereon, although the creditor acted upon the faith and credit of the estate: *New v. Nicoll*, 73 N. Y. 127; 29 Am. Rep. 111. The court said: "The general rule undoubtedly is, that a trustee cannot charge by his executory contracts unless authorized to do so by the terms of the instrument creating the trust. Upon such contracts he is personally liable, and the remedy is against him personally. But there are exceptions to this general rule. When a trustee is authorized to make an expenditure, and he has no trust funds, and the expenditure is necessary for the protection, reparation, or safety of the trust estate, and he is not willing to make himself personally liable, he may, by express agreement, make the expenditure a charge upon the trust estate. In such case he could himself advance the money to make the expenditure, and he would have a lien upon the trust estate, and he can, by express contract, transfer this lien to any other party who may, upon the faith of the trust estate, make the expenditure: *Noyes v. Blakeman*, 6 N. Y. 567; *Randall v. Dusenbury*, 63 N. Y. 645; *Stanton v. King*, 8 Hun, 4."

Some cases hold that the trustee may charge the estate or anticipated profits thereof with the expenses necessary for its protection when there are no funds in his hands, although such power is not specified in the instrument creating the trust: *Randall v. Dusenbury*, 63 N. Y. 645; *Mayfield v. Kilgour*, 31 Md. 241; *Downey v. Bullock*, 7 Ired. Eq. 112. This, however, is undoubtedly against the great weight of authority. In *Busse v. Schenck*, 12 Daly, 12, it was decided that, in the absence of authority or pressing necessity, a trustee cannot make a binding contract for repairs on a building belonging to the trust estate. If a trustee borrows money for his own use, and assigns an order or decree in favor of the trust estate as security, the assignment is invalid: *Brewster v. Galloway*, 4 Lea, 555.

A trustee of a trust for charitable uses has power by contract to charge the trust property with the reasonable expense of its necessary preservation, improvement, and repair, in favor of one who expends money, labor, or materials for that purpose: *Mannix v. Purcell*, 46 Ohio St. 103; 15 Am. St. Rep. 562.

In those jurisdictions where, under statute, the trustee may charge the trust estate with claims of creditors, under some circumstances it is incumbent on the creditor in a suit to subject such estate to his claim to prove the existence of the trust estate, of what it consists, and the specific acts which render it liable for the debt. It was so decided on a bill to subject a trust estate for mill machinery sold to the trustee for the use and benefit of the estate: *Jackson v. Pool*, 73 Ga. 801; and in an action where a trustee had given his note for the payment of the debt: *Gaudy v. Babbitt*, 56 Ga. 640; also deciding that the note itself was not sufficient to warrant a recovery; to the same effect, *McFarlin v. Stinson*, 56 Ga. 396. So the individual notes of the trustee and one of the beneficiaries will not charge the trust estate, although such notes were given for the supplies furnished for the benefit of the trust, and although the creditor looked alone to the trust estate for payment. If the bill is founded alone on the notes, and not directly on the account in lieu of which they were given, there can be no decree subjecting the trust property: *Frost v. Schackelford*, 57 Ga. 260. A bill to the effect that the trustee owned a certain business house wherein he carried on

business for the trust estate, and bought of plaintiff articles necessary for such business, that the creditor at the time was ignorant of the trust and credited, to some extent, the trustee, afterwards ascertaining that he was insolvent and had used the goods for the trust business, thereby making profits which went into such business by way of repair and improvement, and into the purchase of real estate for the trust, with an exhibit attached containing copies of the trust papers, is sufficient to subject the trust property to the payment of the debt: *Moore v. Lampkin*, 63 Ga. 748. An attorney who, at the instance of a trustee having power to employ him, has rendered necessary and beneficial services to the trust estate, is entitled to be compensated out of such estate if the trustee employing him afterwards proves to be a defaulter and absconds without paying the claim: *Manderson's Appeal*, 113 Pa. St. 631. Where certain property is conveyed to trustees to receive the profits and pay them over to the *cestui que trust* beyond the necessary expenses incident thereto, a debt contracted by the trustees for repairs is a proper charge against the trust estate, which may be subjected to its payment under a mechanic's lien: *Cheatham v. Rowland*, 92 N. C. 340.

In addition to what has already been incidentally said, it may be stated as well-established doctrine universally applied, that a trustee has a right to make advances or necessary repairs or improvements for the benefit of the trust estate against which he has a lien for reimbursement of such advances, or costs and expenses, which he may enforce before he can be compelled to surrender the estate, unless prohibited either expressly or by necessary implication from incurring such expenses by the terms of the instrument creating the trust: *Dickinson v. Conniff*, 65 Ala. 581; *Jones v. Dawson*, 19 Ala. 672; *Smith v. Walker*, 49 Iowa, 293; *Murray v. De Rottenham*, 6 Johns. Ch. 52; *Fearn v. Mayers*, 53 Miss. 453; *Norton v. Phelps*, 54 Miss. 467; *Ferry v. Laible*, 27 N. J. Eq. 146; *Bradbury v. Birchmore*, 117 Mass. 569; *Williams v. Smith*, 10 R. I. 280; *Myers v. Myers*, 2 McCord Ch. 214; 16 Am. Dec. 618. Such lien will pass to the trustee's assignee in insolvency as individual assets: *Mannix v. Purcell*, 46 Ohio St. 103; 15 Am. St. Rep. 562. In *Askew v. Myrick*, 54 Ala. 31, it is said: "The execution of the trust may have compelled him to incur expenses, or have required the employment of third persons whose services became beneficial to the trust estate. Until he was reimbursed such expenses, and the claims for compensation of those employed by him were satisfied, he could not be compelled to surrender the estate. If he had received funds, or was in default to a sum equal to such expenses, he could be compelled to surrender, because he could retain, and was supposed to retain, the funds for his indemnity, or if in default, from that default he should satisfy the claims of those employed by him for which he was personally liable."

Trustees invested with general powers of control and management are not bound to strict limitations; they are justified in making ordinary repairs and improvements and insuring the property, and are allowed to hold the estate until reimbursed; nor does the right of reimbursement depend upon the knowledge or consent of the *cestui que trust*: *Woodard v. Wright*, 82 Cal. 202; or of his co-trustees: *Miller v. Beverleys*, 4 Hen. & M. 415.

The right of a trustee to be reimbursed out of the trust estate covers not only payments actually made by him, but also his liability to pay, and by virtue of his right he may resort to the trust fund, in the first instance, for necessary expenses: *In re Blundell*, 57 L. J. Ch. D. 730. However, such right to be indemnified is strictly limited to the trust fund: *In re Winchelsea*, L. R. 39 Ch. D. 168; 58 L. J. Ch. D. 20. The trustee is entitled to be

reimbursed only such expenditures as are necessary, or imposed upon him by the instrument creating the trust: *Tracy v. Graves R. R. Co.*, 84 Mo. 210; or such as would be sanctioned by the court if the question were submitted to it in the first instance. As money advanced to buy in an outstanding title for the benefit of the trust estate: *King v. Cushman*, 41 Ill. 31; or to remove any encumbrance: *Freeman v. Tompkins*, 1 Strob. Eq. 53; as simple debts: *Carpenter's Appeal*, 2 Grant Cas. 381; executions against the trust estate: *Harrison v. Mock*, 16 Ala. 616; board and education of the cestui que trust: *Hardy v. Park*, 23 Ga. 369; necessary expenses for legal advice or counsel fees in conducting litigation for the benefit of the trust: *McElhenney's Appeal*, 46 Pa. St. 347; *Wilson's Appeal*, 41 Pa. St. 34; *Williams v. Smith*, 10 R. L. 280; *Towle v. Mack*, 2 Vt. 19; and in all other proper cases.

CASES
IN THE
SUPREME COURT
OF
INDIANA.

CATALANI v. CATALANI.

[124 INDIANA, 54.]

STATUTE OF FRAUDS SHOULD NOT BE MADE AN INSTRUMENT OF FRAUD—

STATUTE OF FRAUDS.—WHERE A WOMAN ABOUT TO BE MARRIED IS INDUCED TO CONVEY her property to the wife of a brother of her intended husband, by the agreement of the grantee and the representations of the intended husband that as soon as the marriage took place she would reconvey the property to the grantor, and where the relations of the parties to the deed were, before it was made, of a very intimate and fiduciary character, the agreement to reconvey will not be regarded as within the statute of frauds, and will be specifically enforced. Where it would operate as fraud to allow a grantee to rely upon his deed absolute on its face, parol evidence will be admitted to prove the facts establishing a trust.

W. B. Walls and G. L. Walls, for the appellants.

W. W. Herod and W. P. Herod, for the appellee.

OLDS, J. This action was brought by the appellee against Mary Catalani and Nicoli Catalani, appellants. The complaint is in two paragraphs. The first paragraph seeks to recover two thousand dollars, the purchase-money for certain real estate conveyed by the appellee to the appellant Mary Catalani. The second paragraph seeks a reconveyance of certain real estate situate in Marion County, and conveyed by appellee to the appellant Mary Catalani. The appellants demurred to each paragraph of the complaint, which demurrer was overruled, and exceptions reserved. Issues were joined and a trial had, resulting in a finding and judgment in favor of the appellee for the recovery of the real estate.

Appellants filed a motion for a new trial, which was overruled, and exceptions reserved.

Errors are assigned on the rulings of the court in overruling the demurrer to the complaint, and in overruling the motion for a new trial.

The principal question is presented by the ruling of the court in overruling the demurrer to the second paragraph of the complaint. The second paragraph of the complaint is, in substance, as follows: It is alleged that on the second day of July, 1886, the appellee was the widow of one Michael Pantone; that upon the death of her husband there descended to her, as such widow, certain real estate, which is described; that on said second day of July, 1886, she contemplated marriage with one Frank Catalani, and that in order to relieve said real estate from the operation of the statute prohibiting her from selling, conveying, mortgaging, or encumbering the same in any way during her second marriage, it was agreed between said appellant Mary Catalani and appellee that the appellee should convey said real estate to said Mary Catalani, to be held by said Mary for the use and benefit of the appellee until the appellee should consummate her said contemplated marriage by having the marriage ceremony with the said Frank Catalani performed in due form of law, and upon said marriage taking place, the said Mary Catalani and her husband, said Nicoli Catalani, who also assented to said arrangement, agreed to reconvey said real estate back to and vest the title to the same in the appellee; that the present husband of the appellee, said Frank Catalani, is a brother of the said Nicoli Catalani, and said Frank had lived in the family of the said Mary and Nicoli as a member thereof, and that the relations of the said appellee and the appellants and said Frank Catalani were, at and before the time of said conveyance, of a very intimate and confidential character, and the appellee was induced by her present husband and the appellants to believe that she could safely vest the title to the said real estate in said Mary Catalani, and that she would, in good faith, hold said title for and reconvey the same back to her as soon as she and said Frank were married; that she in good faith relied upon the integrity and good faith of said Mary, and conveyed said real estate to her as aforesaid; that within a few days after said conveyance the appellee was duly and legally married to said Frank Catalani, and after her said marriage she requested said Mary to reconvey said real estate

to her by quitclaim deed, as she had solemnly agreed to do; but said Mary, intending to cheat and defraud this appellee out of said real estate, and to hold the same for her own use and benefit, absolutely refused to convey the same to her; and though often requested so to do, still refuses to reconvey the same. Prayer for reconveyance, etc.

It is contended by counsel for appellants that the conveyance is a valid one, and that the paragraph of complaint seeks to show by parol that a deed, absolute upon its face, was made upon the agreement of the grantee to hold the land in trust, and reconvey it to the grantor at a future time upon the happening of a contingency, and that this cannot be done; that such an agreement is within the statute of frauds, and cannot be proven by parol.

By the demurrer, the appellants admit the facts alleged in this paragraph, which show that the appellant Mary received the conveyance and title to the land without any consideration whatever; that by virtue of the intimate and confidential relations existing between the parties the appellants were enabled to induce, and did by their promises induce, the appellee to rely upon their good faith and honesty and convey the land to said Mary upon an agreement that she would reconvey the same upon her marriage; and that she now, with the intent to cheat and defraud the appellee out of the land, and retain the same for her own use, refuses to reconvey the same as she agreed. If, under these circumstances, the appellee was prevented by the statute of frauds from recovering the land, the statute would operate to enable, and be the means of enabling, the appellant Mary to perpetrate a fraud upon the appellee; and it has been repeatedly held that this is not the purpose of the statute of frauds, and that the statute will not be permitted to aid in the perpetration of a fraud. Thus in the case of *Tinkler v. Swaynie*, 71 Ind. 562, it was said by the court: "It has often been held that the statute of frauds shall not be made an instrument of fraud."

Davies v. Otty, 35 Beav. 208, is a case where the plaintiff's wife deserted him, in 1844, and left with her paramour. In 1854, the plaintiff, not having heard of his wife since her departure, believed her to be dead, and married a second wife. In 1860, plaintiff was informed that his first wife was still living, and fearing prosecution for bigamy, he made an arrangement with the defendant that the plaintiff should transfer his land to the defendant, which he did, the defendant to

hold the same until after he was through with his difficulty, and then to reconvey the same. Plaintiff afterwards learned that the prosecution for bigamy was barred by limitation, and called upon the defendant to reconvey the land to him, and the defendant refused, and claimed the land as his own. It was held that the statute of frauds did not apply, and that the plaintiff was entitled to recover. The court, in that case, after stating the facts, say: "This being so, I am of opinion that 'it is not honest to keep the land.' If so, this is a case in which, in my opinion, the statute of frauds does not apply."

In *Damschroeder v. Thias*, 51 Mo. 100, it is held that where one acquires title to land by fraud, and by fraud induces the owner to convey to him or acknowledge his title, a court of equity will declare him a trustee for the owner, and that he cannot, in such case, invoke the statute of frauds and claim that agreements by which the title was obtained were verbal, and therefore void under the statute of frauds, and that the statute of frauds was never intended for the protection of fraud. While this decision probably goes too far, yet we cite it as showing that some courts go further in the admission of parol evidence than it is necessary to do in this case in order to sustain the complaint.

In 1 Perry on Trusts, section 226, it is said: "The statute of frauds is no obstacle in the way of proof of an actual or constructive fraud in the sale of property. Parol evidence is admissible to establish a trust, even against a deed absolute on its face, if it would be a fraud to set up the form of the deed as conclusive." It is further said: "But where a conveyance in trust is made voluntarily, without solicitation or undue influence, a mere promise to hold in trust is within the statute."

But the facts alleged in this case show that the parties bore a peculiar and confidential relation to each other, and that the appellee was solicited, prevailed upon, influenced, and induced by the appellants to make the conveyance, and it would operate as a fraud to permit the form of the deed to be set up as a defense to the action.

This court has recognized this same doctrine in a number of cases. In *Cox v. Arnemann*, 76 Ind. 210, numerous authorities are cited and quoted from recognizing the doctrine that where it would operate as a fraud to allow the grantee to rely upon his deed, absolute upon its face, parol evidence will be admitted to prove the facts establishing a trust. Also in the

cases of *Teague v. Fowler*, 56 Ind. 569; *Jackson v. Myers*, 120 Ind. 504; *McDonald v. McDonald*, 24 Ind. 68.

We are of the opinion that the second paragraph stated a good cause of action, and that the demurrer thereto was properly overruled.

The question presented by the overruling of the motion for a new trial is as to the sufficiency of the evidence, and presents substantially the same question as the one presented by the demurrer to the complaint. The evidence supports the finding.

There is no error in the record.

Judgment affirmed, with costs.

STATUTE OF FRAUDS — TRUSTS. — A grantee's violation of a promise to reconvey is constructively fraudulent, and gives rise to a constructive trust, which may be established by parol, if he obtains an absolute deed without consideration, by means of a parol promise to reconvey to the grantor, to whom he stands in a confidential relation, even if there be no intention at the time not to perform the promise: *Brison v. Brison*, 75 Cal. 525; 7 Am. St. Rep. 189; compare *Clark v. Hancy*, 62 Tex. 511; 50 Am. Rep. 536.

CONTINENTAL INS. Co. OF NEW YORK CITY v. KYLE.

[124 INDIANA, 132.]

INSURANCE. — POLICIES OF INSURANCE ARE TO BE CONSTRUED with reference to the intentions of the parties, to be ascertained from the terms and conditions placed therein.

INSURANCE — CONSTRUING CONDITIONS AGAINST BECOMING VACANT AND UNOCCUPIED. — In construing a condition in an insurance policy against vacancy or unoccupancy, the courts will look to the subject-matter of the contract. The occupancy of a dwelling, of a mill, or of a barn, is each essentially different in its scope and character, and the construction must be with reference thereto.

INSURANCE. — CONDITION AGAINST DWELLING BECOMING VACANT AND UNOCCUPIED is broken if the former tenant moved out five days before the fire, though the building had been leased to another, who had made some repairs, and left some planes in the house, had banded some hay, and put it in a stable-loft, and buried some potatoes on the premises, and intended to move in on the following day.

H. H. Boudinot, W. Eggleston, and E. Reed, for the appellant.

C. F. McNutt, J. G. McNutt, and F. A. McNutt, for the appellee.

BERKSHIRE, C. J. This was an action brought by the appellant to review a judgment obtained by the appellee against

the appellant in an action upon an insurance policy issued by the appellant to the appellee, the said judgment having been obtained in the said Vigo circuit court.

The complaint rests upon the first branch of section 616, Revised Statutes of 1881. The court below sustained a demurrer to the complaint, and the appellant elected to abide by the ruling upon the demurrer, and judgment having been given for the appellee, this appeal is prosecuted.

The errors of law stated in the complaint are: 1. The court erred in its conclusions of law upon the facts found and stated in its special finding; 2. The court erred in overruling the plaintiff's motion to modify said special finding; 3. The court erred in overruling the motion for a new trial.

The first alleged error involves substantially the same questions as the third, and as the third presents the questions more clearly and satisfactorily, we do not care to consider the first.

It does not become necessary to consider the second alleged error. But see *Levy v. Chittenden*, 120 Ind. 37.

The policy sued upon in the original action contained the following conditions: "Or if the assured, without written permission hereon, shall now have or hereafter make or procure any other contract of insurance, whether valid or not, or if the above-mentioned buildings be or become vacant or unoccupied, or be used for any other purpose than is mentioned in said application, without consent indorsed hereon, or if the property shall hereafter become mortgaged or encumbered, or upon the commencement of foreclosure proceedings, or in case any change shall take place in the title or possession (except by succession by reason of the death of the assured) of the property herein named, or if the assured shall not be the sole and unconditional owner in fee of said property, or if the policy shall be assigned, or if the risk shall be increased in any manner, except by the erection of ordinary out-buildings, without consent indorsed hereon, then in each and every one of the above cases this policy shall be null and void."

The foregoing conditions are such as the parties have a right to place in their contract, and as they form a part of the contract, the courts cannot disregard them. It is the duty of the courts to recognize and enforce the contracts of parties, when valid and binding, according to the terms and conditions thereof as expressed therein.

The portion of the policy which we have above set out is

plain and easily understood. Policies of insurance, like all other contracts, are to be construed with reference to the intention of the parties, to be ascertained from the terms and conditions placed therein: *Barton v. Home Ins. Co.*, 42 Mo. 156; 97 Am. Dec. 329; *Straus v. Imperial Fire Ins. Co.*, 94 Mo. 182; 4 Am. St. Rep. 368; *Ripley v. Aetna Ins. Co.*, 30 N. Y. 136; 86 Am. Dec. 362; *Wells, Fargo, & Co. v. Pacific Ins. Co.*, 44 Cal. 397; *Home Ins. Co. v. Gwathmey*, 82 Va. 923.

With this most important rule as our guide when we read and consider the policy here under consideration, we must reach the conclusion that for a breach of any one of the conditions above named, on the part of the assured, the insurer was, because thereof, to be absolved from all liability on account of the policy, unless its consent to such breach of condition should be obtained in advance thereof.

There is no contention that the appellant, by indorsement on the policy, or otherwise, ever gave its consent that the building insured should become or stand vacant.

This leaves but one further question for our consideration: Had the building become vacant before it was burned?

If the evidence establishes the affirmative of this proposition beyond controversy, then the court erred in overruling the motion made in the original action for a new trial, and erred in overruling the demurrer to the complaint in the present action.

In our opinion, the court erred in both of its rulings. The complaint charges that the building was destroyed by fire on the thirty-first day of October, 1886, and the special finding states that the tenant who had occupied the building moved out on the twenty-sixth day of October, 1886, and that the fire occurred on the thirty-first day of the same month.

The undisputed evidence is, that the tenant moved out on the twenty-sixth day of March, 1886, and that the fire occurred on the thirty-first day of said month.

We have concluded to set out the evidence as we find it in the bill of exceptions, with reference to the occupancy of the building.

The appellee testified: "At the time the building was insured it was occupied by myself, and afterwards by my aunt. She moved out of the house on the twenty-sixth day of March, 1886, and took everything out of it. Prior to her removal from the house I had rented it to Crabb and McClintock. After she moved out they made some repairs on the house,

and when they finished repairing they left two or three planes in the house. On the 30th or 31st of March the said Crabb and McClintock hauled some hay and put it in the stable-loft on the premises, and intended to move in on the first day of April, 1886. On the night of the thirty-first day of March, 1886, the house was totally destroyed by fire. At the time it burned, the only articles in it were the planes left there by Crabb and McClintock after they had finished the repairing."

Mrs. Kyle testified: "I am the aunt of the plaintiff. I moved out of the house which was burned down, for the purpose of letting the new renters in, — Crabb and McClintock. There was some hay in the stable and some potatoes buried in the ground near the house by Crabb and McClintock. The house was a frame house. Crabb and McClintock lived about one and a quarter miles from the house."

John Crabb testified: "I and Mr. McClintock, prior to March 26, 1886, rented the house belonging to Mr. Kyle, which was burned down on the thirty-first day of March, 1886. After we rented it Mrs. Kyle moved out, on the twenty-sixth day of March, 1886, and took all of her things out of the house. After she moved out we made some repairs on the house, and intended to move into the house on the first day of April, 1886. We had moved some of our things on the premises. I put some hay in the stable-loft. After we got done repairing we left a plane or two in the stable. They were the only property we had there at the time the house burned down. No one was living in the house when it burned down. It was unoccupied by any one."

Henry McClintock testified: "I and Mr. Crabb rented the house that was burned down, of Mr. Kyle, the plaintiff. At the time we rented it, his aunt, Margaret Kyle, was living in it. On the twenty-sixth day of March, 1886, she moved out and took all of her things out. After she moved out we made some repairs on the house, and when we finished repairing we left a few planes in said house. On or about the thirtieth day of March, 1886, we hauled some hay and put it in the stable-loft. At the time the house burned down it was unoccupied by any one. The planes were all the property that was in it. We intended to move in the next day after the fire occurred."

We have examined the authorities to which counsel for the appellee in their brief call our attention, and other authorities

which we have been able to find in the same line, but think they do not support the rulings of the court to which we have called attention.

As strong a case as we have been able to find in support of the contention of the appellee is the case of *Eddy v. Hawkeye Ins. Co.*, 79 Iowa, 472; 59 Am. Rep. 444. The syllabus to that case is as follows: "A tenant moved out of an insured dwelling on Tuesday, and on Wednesday morning the owner took possession, and with his servants, began cleaning it, and they were continuously engaged during the working-hours of each day in cleaning, and moving goods into the house, until Friday evening, intending that the family should be fully domiciled there on Saturday; but on Friday night the house was burned. Held, that the house was not vacant."

The facts, as stated by the learned judge who delivered the opinion of the court, are as follows: "The house had been temporarily occupied by a tenant, who removed therefrom on Tuesday. The fire occurred on the following Friday night. The plaintiff was residing in another house, on another part of the farm; and on the next morning after the tenant moved out of the house which was burned, the plaintiff took possession of it, and his employees cleaned the house and prepared to move in. They were constantly engaged every day in cleaning the house, and in moving in household goods, until Friday evening. By that time there were carpets, and bedding and bedsteads, cans of fruit, chairs, pictures, mirror, and a stove, and clothing, a table, and dishes, in the house, and the family were expected to be there to remain, on Saturday. The farm stock was there, and the plaintiff, or his employees, were in and about the house every day from six o'clock in the morning until seven or eight o'clock in the evening. The preparation for occupying the house was continuous during all the working-hours of each day." The court could very well hold, as it did, from these facts, that the building was not vacant when burned.

But we hereafter cite a later case from the same court, where the facts were not so favorable to the insurance company as the case before us, in which it was held that the policy could not be enforced.

Most of the cases to which counsel call our attention, if the buildings insured were dwellings, were where there was a permanent occupancy and a temporary absence of the tenant at the time of the fire; and if mills or manufactories, where

there was but a temporary suspension of business at the time of the fire.

In construing a condition in an insurance policy against vacancy or non-occupancy, the courts will look to the subject-matter of the contract: *Whitney v. Black River Ins. Co.*, 72 N. Y. 117; 28 Am. Rep. 116; *American Fire Ins. Co. v. Brighton Cotton Mfg. Co.*, 125 Ill. 131; *Georgia Home Ins. Co. v. Kinnier*, 28 Gratt. 88; *Sonneborn v. Insurance Co.*, 44 N. J. L. 220; 43 Am. Rep. 365.

The occupancy of a dwelling, of a mill, of a barn, is each essentially different in its scope and character, and the construction must have reference thereto: *Sonneborn v. Insurance Co.*, 44 N. J. L. 220; 43 Am. Rep. 365; *Kimball v. Monarch Ins. Co.*, 70 Iowa, 513. The house covered by the policy here under consideration was a dwelling. It became entirely vacant on the twenty-sixth day of March, 1886, and remained so until its destruction by fire on the thirty-first day of March. The prospective tenants made some repairs on the building after Mrs. Kyle vacated it, but the nature and character thereof do not appear, nor the length of time they were engaged thereat. It appears that the repairs were completed about the 30th of March, and on that day the prospective occupants moved some hay to the loft of the stable on the premises, and then or before buried some potatoes on the premises, but all of the witnesses state that the building was unoccupied when burned, and had not been occupied after Mrs. Kyle moved out, and that the only things left in it at any time after her removal were a couple of carpenter's planes left there by Crabb and McClintock during the time they were making the repairs and thereafter.

The contract, in all of its parts, was one that the parties were competent to make, and which they had a perfect right to enter into, and hence they are bound by all of its terms and conditions.

From the time the building became vacant until its destruction the risk which the appellant had assumed was increased because of the vacancy, and it was an increase of risk which the appellant had guarded against by its contract. It would be folly to contend that the building would have been consumed notwithstanding the vacancy. Most certainly the care and vigilance that would have accompanied the occupation of the property, for its protection and preservation, was lessened because of the vacancy.

In the light of all of the authorities, the facts which the record discloses establish beyond question that the property was "vacant or unoccupied" from the 26th of March, 1886, until it was consumed by fire, on the 31st of that month.

In *Ætna Ins. Co. v. Meyers*, 63 Ind. 238, the condition in the policy and the circumstances of the case and those in the present case do not materially differ. The following is the condition in the policy in that case: "It is hereby agreed and declared to be the true intent and meaning of the parties hereto, that in case the above-mentioned building shall at any time after the making and during the continuance of this insurance become unoccupied, . . . unless herein otherwise specially provided for, or hereafter agreed by the company, in writing added or indorsed on this policy, then and from thenceforth, so long as the same shall be so unoccupied, . . . these presents shall cease and be of no force or effect."

We copy the following from the opinion: "It appeared by the evidence that the house was occupied by tenants when it was insured; that the tenants failed to pay rent when due, and the landlord took steps to remove them. Myers, the owner, testified: 'No one lived in the house at the time of the fire. The tenants left on Friday or Saturday. The building was burned the next Tuesday. The building was used as a tenant-house. It was a double tenement, usually occupied by two families. I put the tenants out because they would not pay rent. I had engaged it to S. C. Carney as soon as I could get them out and have the building repaired. A little plastering and whitewashing was all that was needed. Carney was living in my house across the street, and was to go into it for a year, as soon as I could get the tenants out, and get Fred Myers to fix the house. The tenant was to move in as soon as it was repaired.' In the case at bar, the house was unoccupied at the time it was burned; it had been unoccupied for about four days; some of the witnesses make the time longer; and no definite time when it was to be occupied was fixed. It was to be occupied as soon as it should be repaired by Fred Myers. . . . As a matter of fact, as we have said, the house was unoccupied when it was burned. By its terms, the company was not liable on the policy sued upon. The policy was a contract. What reason appears for giving it an operation by construction different from that which its terms require? It seems to us that the literal meaning expresses just what the parties intended. Here a tenant-house

is insured for a year. A change of tenants, during the time, is not prohibited, and might naturally be expected; short intervals in which the property would be vacant might naturally occur. The contract provided that when they did occur, the policy should not be operative during their existence."

In *Cook v. Continental Ins. Co.*, 70 Mo. 610, 35 Am. Rep. 438, the condition in the policy was: "If the premises become unoccupied without the assent of the company indorsed hereon, then, and in every such case, the policy shall be void."

The following is the learned judge's statement of the facts: "About two weeks before the fire, the plaintiff went to Kansas City, Missouri, to reside, and lived there until after the fire. She shipped a car-load of her furniture to the latter place, and left about three hundred dollars' worth in the house, and instructed one Barnard to sell it, except a bedroom set, and also to rent the house. Joseph Southwick was left in possession, with instructions to remain in possession and sleep in the house until he could rent it. De Laney was to rent the house. Southwick went to Kansas City three or four days before, and was there when the fire occurred. He left no one in the house, but told De Laney, with whom he left the keys, except the key of the bedroom he had slept in, to take charge of the house, and rent it, if he could, before he returned."

And following this recital of the facts, the learned judge goes on to say: "On these facts, the question arises, Was the house unoccupied when it was burned? If it was, she was not entitled to recover. 'Occupation of a dwelling-house is living in it': *Paine v. Agricultural Ins. Co.*, 5 N. Y. Super. Ct. 619. 'A fair and reasonable construction of the language "vacant and unoccupied" is, that it should be without an occupant,—without any person living in it': 78 Ill. 169. Speaking of a dwelling-house and barn, Colt, J., in *Ashworth, v. Builders' Ins. Co.*, 112 Mass. 422, 17 Am. Rep. 117, observed: 'Occupancy, as applied to such buildings, implies an actual use of the house as a dwelling-place, and such use of the barn as is ordinarily incident to a barn belonging to an occupied house, or at least something more than a use of it for mere storage. The insurer has a right, by the terms of the policy, to the care and supervision which is involved in such an occupancy.' In Wood on Insurance, page 164, the

above observations of Colt, J., are quoted and approved. In *Paine v. Agricultural Ins. Co.*, 5 N. Y. Super. Ct. 819, it was said that 'occupation of a dwelling-house is living in it, not mere supervision over it, and while a person need not live in it every moment, there must not be a cessation of occupancy for any considerable portion of time.' After citing other authorities, the court say: "Applying the doctrines of the above-cited cases to this, it is clear that, within the meaning of the clause under consideration, the premises insured were unoccupied from the time the plaintiff went to Kansas City until the fire occurred."

Farmers' Ins. Co. v. Wells, 42 Ohio St. 519, supports the contention of the appellant. The tenant moved out with no intention of returning, leaving behind a barrel of corn and a coal-oil can. During the night following the removal, the building was destroyed by fire. The court said: "The condition that the policy should be void if the building therein mentioned be 'vacated or unoccupied' was absolute. The parties to the contract were competent to make such a stipulation." The court concludes by holding that the property was vacant and the policy void, and says that the duration of the vacancy was wholly immaterial.

In the case of *Sleeper v. New Hampshire F. Ins. Co.*, 56 N. H. 401, the condition of the policy was: "If the premises hereby insured become vacated by the removal of the owner or occupant, without immediate notice to the company and consent indorsed hereon, . . . this policy shall be void."

In the opinion of Smith, J., it is said: "It is apparent the insurers intended to guard against the increased risk which inevitably affects buildings where no one is living or carrying on any business. An unoccupied building invites a shelter to wanderers and evil-disposed persons. No one interested is present to watch or care for the property, or seasonably to extinguish the flames in case of fire; and for various reasons that might be enumerated, an unoccupied building is more exposed to destruction, to say nothing of the inducement a dishonest owner would have to turn it, if unprofitable, into money, when insured, by becoming a party to its destruction by fire. If, then, the motive is to have some one present, occupying and dwelling in the buildings, and interested to preserve the roof that shelters his family or holds his household goods, that object would plainly be defeated by holding that he and his family may depart with all their possessions, save,

perhaps, a few articles not needed for present use, and still the premises be considered occupied. . . . I cannot say that I have any doubt that these buildings were vacant at the time they were burned, in the sense in which that term was used in the policy."

All of the reasoning of the court has much force when applied to the facts of the case we have before us. In the same case, Ladd, J., said: "I think, when the occupant of a dwelling-house moves out with his family, taking part of his furniture and all of the wearing apparel of the family, and makes his place of abode in another town, although he may have an intention of returning in eight or ten months, such dwelling-house, while thus deserted, must be regarded as unoccupied—that is, vacated—according to the naturally and ordinarily received import of those terms. It is the very situation against the hazards of which the defendants undertook to guard themselves by an express stipulation and condition inserted in the contract upon which this action is founded."

In the case of *Moore v. Phoenix Ins. Co.*, 64 N. H. 140, 10 Am. St. Rep. 384, it is held that the words "vacant" and "unoccupied," when used in a policy of insurance in connection with the idea that the insurer was stipulating against an increase in the risk from the absence of persons from the premises insured, must be regarded as interchangeable and equivalent in meaning; that when no one lives in the house it is both vacant and unoccupied, though it may contain articles of furniture which the last occupant failed to remove. In the learned note to the foregoing case (10 Am. St. Rep. 391), it is said: "There is strong authority in support of the rule that a fair and reasonable construction of the term 'vacant and unoccupied' is, that the house should be without an occupant; that is, without any person living in it"; citing *North American Fire Ins. Co. v. Zaenger*, 63 Ill. 464; *American Ins. Co. v. Padfield*, 78 Ill. 167; *Phoenix Ins. Co. v. Tucker*, 92 Ill. 64; *Fitzgerald v. Connecticut F. Ins. Co.*, 64 Wis. 463; *Alston v. Old North State Ins. Co.*, 80 N. C. 326; *Cook v. Continental Ins. Co.*, 70 Mo. 610; 35 Am. Rep. 438. And it is stated: "The same construction is given to the term 'vacant or unoccupied'": *Herrman v. Adriatic Ins. Co.*, 85 N. Y. 162; 39 Am. Rep. 644; *Stupetske v. Transatlantic F. Ins. Co.*, 43 Mich. 373; 38 Am. Rep. 195; *Imperial Fire Ins. Co. v. Kiernan*, 83 Ky. 468; *Sonneborn v. Ins. Co.*, 44 N. J. L. 220; 43 Am. Rep. 365.

As will be remembered, the words "vacant or unoccupied" are employed in the policy under consideration.

In view of these authorities, we repeat, at least in substance, what we have once before said, that we cannot well imagine how it can be said that the building covered by the policy upon which the present action rests can be said not to have been vacant when the fire occurred. It was certainly without an occupant in any sense of the term.

In *Sexton v. Hawkeye Ins. Co.*, 69 Iowa, 99, it was held that the use of a building for the purpose of storing kegs, jars, etc., was not a compliance with the condition against the vacancy of the building.

In *Feshe v. Council Bluffs Ins. Co.*, 74 Iowa, 676, the insured property was a dwelling-house occupied by a tenant, and the policy provided that it should become void if the building became "wholly or partially vacant or unoccupied." The tenant moved out, and five days afterward the property was burned. The owner, who lived but a half-mile distant, spent a part of each intervening day in examining and cleaning the house, but did not stay there at night, and her father, who worked near, left a few tools in the house at night. It was held that the house was "vacant and unoccupied" within the meaning of the policy, and that no recovery could be had thereon.

In *Bennett v. Agricultural Ins. Co.*, 50 Conn. 420, the policy provided that it should be void "if the dwelling-house hereby insured shall cease to be occupied as such." At the time of the insurance the house was occupied by a tenant who moved out about six o'clock on a certain evening, and the house was burned about two o'clock the next morning. It was held that the policy was void, and was not saved by the fact that the fire had actually commenced and was smoldering unobserved when the tenant moved out.

The first of the last two cited cases is in some of its facts much like the case we have under consideration, but the facts of this case support more strongly the contention of the insurer than did the facts in those cases. For a further consideration of the questions discussed, we refer to the exhaustive note to *Moore v. Phoenix Ins. Co.*, 64 N. H. 140; 10 Am. St. Rep. 384.

At this point it may be well to say that we do not wish to be understood as holding that a temporary absence of the occupants of an insured dwelling, the furniture and other con-

tents remaining undisturbed during such temporary absence. would render a policy of insurance thereon inoperative because of a condition against vacancy.

The point is made by counsel for the appellee that counsel for the appellant do not discuss in their brief the ruling of the court upon the motion for a new trial, and therefore waive it. In this contention counsel are mistaken as to the fact.

The judgment is reversed, with costs, with direction to the court below to overrule the demurrer to the complaint, and proceed in accordance with this opinion.

INSURANCE — CONSTRUCTION OF POLICY — CONDITIONS AGAINST BECOMING VACANT AND UNOCCUPIED. — As to the signification of the terms "vacant and unoccupied," and such-like expressions in policies of insurance, see extended note to *Moore v. Phoenix Ins. Co.*, 10 Am. St. Rep. 390-396. See also *Moore v. Phoenix Ins. Co.*, 62 N. H. 240; 13 Am. St. Rep. 556, and note.

BOARD OF COMMISSIONERS OF KNOX COUNTY *v.* JOHNSON.

[124 INDIANA, 145.]

OFFICER. — QUESTION WHETHER AN OFFICE IS OR IS NOT VACANT IS AN INTRINSICALLY JUDICIAL ONE. — *Mandamus* will not lie where an act is judicial, and there is a remedy by appeal.

OFFICIAL BONDS, APPEAL FROM DISAPPROVAL *OP.* — If an officer presents his bond, and it is rejected on the ground that he is not entitled to the office, there is a judicial decision from which an appeal will lie.

OFFICIAL BONDS. — STATUTES REQUIRING OFFICIAL BONDS TO BE FILED WITHIN A DESIGNATED TIME are directory, not mandatory, and the failure to file a bond within such time does not work a forfeiture of the office, nor create a vacancy therein.

OFFICE — FORFEITURE FOR FAILURE TO GIVE OFFICIAL BOND. — One rightfully in office cannot be ousted for failure to give an additional and special bond within the time prescribed by statute, where there is a substantial and close legal question as to when such time began to run, without he is first given a day in court and a hearing.

OFFICER, BEFORE HE CAN BE OUSTED BY AUTHORITY, OTHER THAN THAT OF THE APPOINTING POWER, is entitled to a hearing, because the question whether he shall be ousted is a judicial one, and a decision given without affording him an opportunity to be heard is ineffectual.

OFFICER NEED NOT SHOW THAT HE IS ELIGIBLE TO AN OFFICE to which he has been duly elected and inducted, where the only question is, whether he has forfeited such office by failure to file an additional bond.

W. A. Cullop and C. B. Kessinger, for the appellant.

G. G. Reily, J. Wilhelm, and W. F. Townsend, for the appellee.

ELLIOTT, J. On the third day of June, 1889, the appellee was elected county superintendent of the public schools of Knox County, for the term of two years, and on the fourteenth day of that month he duly qualified. On the twentieth day of June, 1889, the board of commissioners declared the office vacant because of the failure of the appellee to file the special bond required by section 10 of the act of March 2, 1889: *Elliott's Supp.*, sec. 1298. The board on the same day appointed William H. Pennington to the office which it had declared vacant, but he did not accept the appointment. On the twelfth day of August, 1889, the appellee presented the bond required by the statute to which we have referred, but the board refused to accept it. The appellee continued to discharge the duties of the office, but his claim for compensation was rejected. In September, 1889, the board of commissioners appointed Thomas Crosson to the office, and he accepted and qualified. The appellee appealed from the decision of the board to the circuit court, and judgment was there rendered in his favor. In the circuit court the appellant unsuccessfully moved to dismiss the appeal.

It is held by some of the courts that the refusal to accept the bond of a public officer is a ministerial act, and that approval may be coerced by *mandamus*: 2 Am. & Eng. Ency. of Law, 466 h.

But there are many strongly reasoned cases which hold that the duty is a judicial and not a ministerial one: *State v. Dunnington*, 12 Md. 340; *Ex parte Harris*, 52 Ala. 87; 23 Am. Rep. 559; *Thomason v. Justices*, 3 Humph. 233; *Swan v. Gray*, 44 Miss. 398; *County of Bay v. Brock*, 44 Mich. 45. In the case of *Gulick v. New*, 14 Ind. 93, 77 Am. Dec. 49, it was held that *mandamus* will lie to compel a county clerk to approve the bond of a sheriff. The decision in that case may be sustained upon the ground that the clerk was a ministerial officer, and that no appeal could be taken from his action in refusing to approve the bond. But where the officer is a judicial one, and there is a right of appeal, the question is essentially different. There is, however, a decision directly declaring that mandate will lie to compel a board of commissioners to approve the bond of a public officer, or show cause for refusing to approve it: *Board etc. v. State*, 61 Ind. 379. No authorities are cited in support of the conclusion asserted in that case, nor are any reasons adduced, and we very much doubt the soundness of the doctrine asserted. We cannot believe that where the

tribunal is a judicial one, and a right of appeal is provided, *mandamus* is the appropriate remedy, but we feel bound to yield to the decision upon the rule of *stare decisis*. We are not, however, inclined to extend the rule declared in that case, and we deny its application to the present, for the reason that here the rejection of the bond operated to bring in question the right to the office held by the appellee, and the appellant did declare the office vacant. These facts, as we are satisfied, clearly distinguish the case from the case to which we have referred, for much more than the simple approval or rejection of the bond is involved.

The question whether an office is or is not vacant is intrinsically a judicial one: *Stocking v. State*, 7 Ind. 326. In the case cited it was held that the legislature could not, even by an express statute, create a vacancy in a constitutional office; and certainly, if the legislature cannot create a vacancy in a constitutional office, a board of commissioners cannot, by a ministerial or legislative act, create a vacancy in an office created by the legislature. If such a board assumes to declare a legislative office vacant, it assumes to exercise judicial power, and in all cases where its decisions are judicial, there is a right of appeal. It is settled, beyond controversy, that where the act is a judicial one, and there is a remedy by appeal, *mandamus* will not lie.

There is no question before us as to the sufficiency of the sureties on the bond tendered to the appellant, for the bond was rejected upon other grounds. The ground upon which it was rejected directly involved the appellee's right to the office, and therefore a judicial question was presented for decision. We are, for this reason, not required to decide whether the decision of a board of commissioners in rejecting a bond can be reviewed in an action for mandate by appeal, or otherwise.

There is no law requiring an officer who presents a bond for approval to file any claim or complaint. If he presents his bond, and it is rejected for the reasons which influenced the board in this instance, there is a judicial decision from which an appeal will lie.

The validity of the statute which controls this case was affirmed, upon full consideration, in the case of *State v. Hawthorth*, 122 Ind. 462, so that the question remaining for decision is one of construction.

The contention of the appellant is, that the failure of the

appellee to give bond within thirty days after his election authorized a declaration that the office was vacant, and justified the decision refusing to approve the bond. The appellee's position upon this point is, that the execution of the bond within thirty days after the governor issued his proclamation protected his title to the office.

As our statement of facts shows, the appellee was elected after the act of March 2, 1889, went into force, and the question is, whether he lost his title to the office by his failure to give the special bond within thirty days after his election. If he did lose his title to the office, then he is in no situation to complain; for if he is not entitled to the office, he has no cause for action.

The section of the statute which governs the case reads thus: "It shall be the duty of the several county school superintendents of this state, within thirty days from the issuing of the proclamation by the governor, as hereinbefore provided for, and of every county school superintendent hereafter elected, before he enters upon the discharge of his official duties, to enter into a special bond, with at least two freehold sureties of such county, payable to the state of Indiana, conditioned that they will faithfully and honestly perform all the duties required of them by this act, and account for and pay over all moneys that may come into their hands pursuant to the provisions of this act, in a penal sum which shall be equal in amount to one hundred dollars for every one thousand inhabitants of their respective counties as shown by the last census immediately preceding the giving of such bond, to be approved by the board of commissioners of their respective counties; and upon the failure of any county school superintendent to give such bond, his office shall become immediately vacant, and the board of commissioners of his county shall immediately appoint some competent and suitable person to fill such vacancy for the unexpired term of his office."

We cannot agree with the appellee's counsel that the statute does not apply to superintendents elected after the law went into force, but who had given the general bond at the time of their election. We see no reason for attempting change the words used in the statute, and they clearly direct that superintendents elected after its passage shall file a special bond within thirty days after their election. It is only those who were elected prior to the time the statute took

effect that are allowed thirty days after the governor issues his proclamation to file a special bond.

But it by no means results, from the construction we have given the statute, that the appellee lost his title to the office to which he was elected and into which he had been legally inducted. It is held by our own and other courts that statutes requiring official bonds to be filed within a designated time are directory, and not mandatory. Upon this question the authorities are harmonious: *State v. Porter*, 7 Ind. 204; *Smith v. Cronkhite*, 8 Ind. 134; *Mayor v. Geisel*, 19 Ind. 344; *Mayor v. Wright*, 19 Ind. 346; *Speake v. United States*, 9 Cranch, 28; *People v. Holley*, 12 Wend. 481; *State v. Churchill*, 41 Mo. 41; *State v. County Court*, 44 Mo. 230; *Sprawl v. Lawrence*, 38 Ala. 674; *State v. Ely*, 43 Ala. 568; *Kearney v. Andrews*, 10 N. J. Eq. 70; *State v. Falconer*, 44 Ala. 696.

This rule is carried very far, for it is held, without substantial diversity of opinion, that unless the statute makes the filing of a bond within a limited time a condition precedent to the right to the office, the failure to file it within the time prescribed will not work a forfeiture of the right to the office nor create a vacancy. In the case of *City of Chicago v. Gags*, 95 Ill. 503, 35 Am. Rep. 132, the statute provided that upon failure to file a bond within the time designated, the person chosen shall "be deemed to have refused the office, and the same shall be filled by appointment," and it was held not to change the rule. In *State v. Toomer*, 7 Rich. 216, the provision of the statute was, that upon the failure of the person elected to file a bond within the time limited, "his office shall be deemed absolutely vacant, and shall be filled by election or appointment," and the court adjudged upon full consideration that title to the office was not lost. But we cannot further quote from the adjudged cases, and we cite them without comment: *State v. Colvig*, 15 Or. 57; *State v. Peck*, 30 La. Ann. 280; *State v. King*, 29 Minn. 78.

Under the established rule, the mere failure of the appellee to give the additional and special bond required by the act of 1889 did not, it is clear, forfeit his title to the office, for his case is much stronger than those to which we have referred. That the case of the appellee is an unusually strong one is apparent when it is brought to mind that he was actually and rightfully in office, having duly qualified as the law directs.

As he was rightfully in office, and had duly qualified, his failure to execute the special bond cannot by any possibility be considered as a failure to perform a condition precedent to his right to the office. The utmost that can be said is, that it was his duty, if he desired to continue in office, to file the special bond required by the act of 1889.

If the appellee has lost title to the office, it must be for the reason that before he filed the special bond the board of commissioners had declared the office vacant. In order to determine the effect of this declaration it is necessary to consider the facts, and to give some attention to the provisions of the act. The proclamation of the governor was not issued until more than thirty days after the election of the appellee, and until the proclamation was issued no duty could be required of the superintendent which made a bond necessary. There is, indeed, reason for the contention of the appellee's counsel that no superintendent, whether elected before or after the passage of the act, was bound to give the special bond until the governor's proclamation was issued, for until that was done, there was no necessity for a bond. Section 6 of the act provides that as soon as the contract for the furnishing of books shall be entered into, the governor shall issue his proclamation announcing such fact to the people of the state. While we feel compelled to yield to the explicit provisions of section 10, and hold that the direction contained in it applies to all superintendents elected after the passage of the act, we must also hold that there is a substantial and close question involved, for there is no little reason for holding that until the governor issued his proclamation the school superintendents were not bound to proceed under the act. There was a real question as to when it was the duty of the appellee to execute a bond, and a question, too, upon which not only laymen, but lawyers, might, in the utmost good faith, entertain opposite views.

The question comes to this: Can a person rightfully in office be ousted for the failure to give an additional and special bond within the time prescribed in a case where there is a substantial and close legal question as to when the time begins to run, without a day in court and a hearing?

It is to be remembered that the board of commissioners has no power to elect a county superintendent, nor any general power to appoint, so that the question is very different from one arising in a case where the removal is made by the

appointing power. The power to oust an officer rightfully in office is essentially a judicial one, except where it is exercised by the appointing power: *State v. Harrison*, 113 Ind. 434; 3 Am. St. Rep. 663; *Page v. Hardin*, 8 B. Mon. 648; *Dullam v. Willson*, 53 Mich. 392; 51 Am. Rep. 128. If it is judicial, then it seems clear that the officer is entitled to a hearing. In *Williams v. Bagot*, 3 Barn. & C. 786, Bayley, J., said: "It is contrary to common justice that a party should be concluded unheard." The question was fully considered in the case of *Queen v. Archbishop*, 1 El. & E. 545, and it was held that there could not be a removal without a hearing. This decision was made upon a statute providing that a curate whose license was revoked might "appeal to the archbishop of the province, who shall confirm or annul such revocation as shall seem to him proper." Lord Campbell said: "No doubt the archbishop acted most conscientiously, and with a sincere desire to promote the interests of the church; but we all think he has taken an erroneous view of the law. He was bound to hear the appellant, and he has not heard him. It is one of the first principles of justice that no man should be condemned without being heard." Delivering an opinion in a case involving the right to remove an officer, Chief Justice Marshall said: "It is a principle of natural justice, which courts are never at liberty to dispense with, unless under the mandate of positive law, that no person shall be condemned unheard, or without an opportunity of being heard": *Meads v. Deputy Marshal*, 1 Brock. 324.

In the case of *Commonwealth v. Slifer*, 25 Pa. St. 23, 64 Am. Rep. 680, the doctrine was carried very far, perhaps too far; for it was there held that although the governor had the power to appoint, still he could not remove an officer without giving him an opportunity to be heard. In the case of *Biggs v. McBride*, 17 Or. 640, the question arose in a case where the governor, acting under a statute, removed a railroad commissioner who held his office by virtue of a legislative enactment, and the court, in discussing the question whether the power to remove was executive or judicial, said: "But it is believed, under either view, and by whomsoever the power of removal for cause may be exercised, it must be done upon notice to the delinquent of the particular charges against him, and an opportunity be given him to be heard in his defense." Many other cases affirm the same general doctrine: *State v. Hawkins*, 44 Ohio St. 98; *People v. Board of Fire Comm'rs*, 72 N. Y.

445; *People v. Mayor*, 19 Hun, 441; *State v. City of St. Louis*, 90 Mo. 19; *Willard's Appeal*, 4 R. I. 595; *Field v. Commonwealth*, 82 Pa. St. 478; *Foster v. Kansas*, 112 U. S. 201; *Kennard v. Louisiana*, 92 U. S. 480. In the two cases last cited, the supreme court of the United States assumed jurisdiction, without hesitation or question, of cases involving the right to remove state officers, and examined the statutes and proceedings so far as to ascertain whether there was due process of law under the Fourteenth Amendment, thus tacitly deciding that without a hearing an officer cannot be removed.

Our conclusion is, that where, as here, an officer is rightfully in office, and there is a fair question as to whether the time within which he is directed to file a special bond in order to entitle him to continue in office begins to run from the date of his election, or upon the happening of a future event, and he does file a bond within the time designated after such event does happen, a declaration that he has vacated the office, made without a hearing, does not oust him. We are far within the authorities in asserting this conclusion, but the case does not require that a broader or more general one should be asserted.

As the appellee had been duly elected and inducted into office, and as the only question that was presented by his failure to file the additional bond required by the act of 1889 was as to his right to continue in office, it was not necessary for him to show that he was eligible to the office. There is a radical difference between such a case as this and one wherein the plaintiff asserts a right to be admitted to an office.

Judgment affirmed.

OFFICE AND OFFICERS. — *Mandamus* will not lie to review the act of an officer when the duty he is called upon to perform requires the exercise of an act of judgment on his part: *Sansom v. Mercer*, 68 Tex. 488; 2 Am. St. Rep. 505, and note; *Gartner v. Cohen*, 51 N. J. L. 125; *State v. Road*, 41 La. Ann. 73; *Walah v. Brevoort*, 76 Mich. 470; *People v. Garrett*, 130 Ill. 340; *Moon v. Wellford*, 84 Va. 34; *Lyon v. Smith*, 66 Mich. 676; *Boom v. De Haven*, 72 Cal. 280; *State v. Edwards*, 51 N. J. L. 479; *Woodford v. Hull*, 31 W. Va. 470; *State v. Applegate*, 51 N. J. L. 117; *State v. Nelson*, 41 Minn. 25; *Batteries v. Strider*, 31 W. Va. 781; *Mills Publishing Co. v. Larabee*, 78 Iowa, 97.

OFFICE AND OFFICERS — VACANCY. — As to the meaning of the term "vacancy," as applied to an office, see note to *Walah v. Commonwealth*, 33 Am. Rep. 777, 778; *State v. Harrison*, 113 Ind. 434; 3 Am. St. Rep. 663.

OFFICE AND OFFICERS — FAILURE TO FILE BOND. — An officer, by merely failing to file an official bond, does not forfeit his office, and he may file such bond when objection is made to the omission: *Commonwealth v. Slifer*, 25

Pa. St. 23; 64 Am. Dec. 680; but in *Bowds v. City of Bangor*, 46 Me. 541, 74 Am. Dec. 469, it was decided that an officer could not justify as an officer *de jure* until he filed the bond required of him by law. And in *State v. Loughton*, 19 Nev. 202, a failure to file a bond as *ex officio* state librarian was held to create a vacancy in that office.

OFFICE AND OFFICERS—REMOVAL.—An incumbent of an office sought to be removed therefrom is entitled to a judicial hearing: *State v. Harrison*, 113 Ind. 434; 3 Am. St. Rep. 663. In *People v. Freese*, 83 Cal. 453, it was decided that when an officer had been appointed by the governor and confirmed by the senate, and the senate had failed to confirm the nomination by the governor of another officer in his place at the next session, the governor could not, after the close of the session, remove the incumbent and appoint a successor.

CINCINNATI, INDIANAPOLIS, ST. LOUIS, AND CHICAGO RAILWAY COMPANY v. HOWARD.

[124 INDIANA, 200.]

PRACTICE.—A GENERAL OBJECTION TO THE ADMISSION IN EVIDENCE of an answer to a question propounded a witness raises no question for consideration in the appellate court. An objection to evidence that it is improper, incompetent, irrelevant, and immaterial is without effect for any purpose. The precise grounds of objection must be definitely stated.

EVIDENCE—RUE GERAL.—STATEMENTS MADE BY PERSONS WHEN LEAVING THEIR HOME, AS TO THEIR INTENDED DESTINATION, are not hearsay, and are therefore admissible as evidence in an action to recover damages suffered by them at a railway crossing by the collision with a train.

EVIDENCE—CONTRIBUTORY NEGLIGENCE—BURDEN OF PROOF.—When a person crossing a railway track is injured by collision with the train, the fault is *prima facie* his own, and he must show affirmatively that his fault or negligence did not contribute to the injury, before he is entitled to recover therefor.

CONTRIBUTORY NEGLIGENCE.—TRAVELER UPON A PUBLIC HIGHWAY CROSSING A RAILROAD is guilty of contributory negligence if he drives upon the crossing without stopping to look or listen, though he does not hear any whistle sounded nor bell rung, and though the view is obstructed and there are no indications of danger.

RAILROADS—CONTRIBUTORY NEGLIGENCE.—The fact that a train was behind time, and was running faster than its usual speed at a crossing, to make up time, does not exonerate one about to cross the track from exercising the care and caution required when a train is on time and running at its usual rate of speed.

NEGLECTANCE—BURDEN OF PROOF.—One seeking to recover damages for injuries which he claims to have suffered from the negligence of another must show the facts, those which relate to his share of the transaction, as well as those which relate to the defendant, and if, upon the whole case, an inference of negligence arises against the defendant, and of due care on the part of the plaintiff, he may recover.

RAILROAD CROSSING.—A person, before crossing a railroad track, must stop, look, and listen, and this rule applies to pedestrians as well as others.

RAILWAYS—NEGLIGENCE.—If the crossing of a railroad is so obstructed that an approaching train cannot be seen nor heard until the traveler comes very near the railroad track, common prudence requires him to approach at such speed that when an approaching train may be seen, he may be able to stop and allow it to pass.

RAILROAD CROSSING.—If there is any obstruction to sight or hearing in the direction of an approaching train, such obstruction requires increased care on the part of one approaching the crossing. In such cases the care must be in proportion to the increased danger that may come from the use of the highway at such a place.

T. A. Hendricks, A. W. Hendricks, C. Baker, O. B. Hord, A. Baker, and E. Daniels, for the appellant.

L. Ritter, E. F. Ritter, and B. W. Ritter, for the appellee.

BERKSHIRE, C. J. The appellee was the plaintiff below, and appellant the defendant. The *gravamen* of the action is negligence, and in the complaint there is the proper negation of contributory negligence.

The appellant answered in general denial.

The cause was submitted to a jury for trial, a verdict returned in favor of the appellee, and over a motion for a new trial, judgment was rendered upon the verdict. From the judgment at special term an appeal was taken to general term, and from its judgment affirming the judgment in special term this appeal is prosecuted.

Several errors have been assigned, but we are only concerned with certain questions arising out of the court's action in overruling the motion for a new trial.

It is not our province to determine whether the twenty-sixth question put by the appellee to the witness John Kissel, and his answer thereto, were or were not improper, for the reason that no specific objection was made to the same. It has been held time and again that a general objection to the admission of evidence in answer to a question propounded to a witness raises no question for our consideration. The objection which we find in the record is, that the evidence "is improper and incompetent." This is a stereotyped objection to the admission of offered evidence that is without value for any purpose.

There is no available error in the record as to the ruling of the court in allowing the witness Oliver Klingensmith to answer question 27, propounded to him by the appellee. The objection made was: "We object to it, as not rebutting anything, and as incompetent and irrelevant, and immaterial, and having nothing to do with the matter." The

objection is too general; but in view of the testimony as to the distance the road crossings were from each other, introduced by the appellant, and the further testimony introduced by the appellant as to the different points at which the whistle was sounded, we are of the opinion that the question and answer were proper. The illustrations given by counsel for the appellant in their original brief are not parallel cases. What we have said as to the question put and answer given thereto by the witness Oliver Klingensmith applies equally to the question propounded to Francis Mathes and his answer to the same.

The objection to the twenty-first question asked of Mrs. Sarah F. Howard, and her answer thereto, is, that the evidence "is incompetent, irrelevant, and immaterial." The objection is unavailing.

The objections to questions 17 and 18 propounded to this witness, and her answers thereto, are unavailing.

The testimony was not improper. The witness was the mother of the appellee and the wife of Dr. Howard, who lost his life in the accident involved in this controversy. When the husband and daughter left their home, which was also the home of the witness, on the fatal evening, she was present. What was said when they were about to depart, as to their destination, was not mere hearsay, but was a part of the *res gestæ*. It was preliminary to what afterwards happened. Such testimony is always competent.

The appellee was permitted by the court to introduce in evidence certain answers given to certain interrogatories propounded by the appellee to the appellant.

Section 359 of the Revised Statutes of 1881 entitled the appellee to propound interrogatories to the appellant relative to the matter in controversy, and required the appellant to answer the same. After the interrogatories had been answered, by virtue of the same section of the statute it was the appellee's right to introduce the answers in evidence, if she so desired. If the interrogatories were not relevant, the appellant should have moved their rejection; if the appellant gave irrelevant answers to the interrogatories, that was its own fault, and it cannot complain that they were introduced in evidence.

This brings us to the questions arising in the record because of the instructions given to the jury by the court, and those refused.

This is an action to recover damages because of injuries to the appellee occasioned by an accident occurring at a point where the appellant's railroad crosses a certain highway located in Marion County, Indiana.

The appellee and her father, Dr. Howard, were in a buggy drawn by one horse, and were in the act of passing over the railroad track when struck by one of the appellant's locomotive-engines pulling a train of cars along its said railroad and across said highway.

The correctness of the instructions depends upon the duties and liabilities of the parties under the recognized rules of law in such cases. And at this point, as well as at any other, we may state that there was a conflict in the evidence as to whether the whistle was sounded and the bell rung as the statute law of the state then required, and the jury having found that they were not, we are concluded by the finding, and in the further consideration of the case shall take it for granted that the appellant was guilty of negligence contributing to the disaster.

This will leave but the one main fact, and the questions which are involved relating to it: the want of contributory negligence on the appellee's part.

In *Hathaway v. Toledo etc. R'y Co.*, 46 Ind. 25, the following instruction was held to be correct as a statement of the law: "When a person crossing a railroad track is injured by a collision with a train, the fault is *prima facie* his own, and he must show affirmatively that his fault or negligence did not contribute to the injury, before he is entitled to recover for such injury."

In the case of *Cincinnati etc. R. R. Co. v. Butler*, 103 Ind. 31, it is said: "In cases where contributory negligence may be claimed, it is settled in this court that the absence of contributory negligence is part of the plaintiff's case, both as to averment and proof."

In *Lyons v. Terre Haute etc. R. R. Co.*, 101 Ind. 419, it is said: "It is too well settled to admit of debate that a party who sues for an injury to person or property resulting from negligence must prove that he was himself without negligence: *Cincinnati etc. R'y Co. v. Hiltzhauer*, 99 Ind. 486, and authorities cited."

In *Indiana etc. R'y Co. v. Greene*, 106 Ind. 279, 55 Am. Rep. 736, it is said by this court: "It may suffice to say, since it is the established rule of this court, as it is of the courts in a

large majority of the states, that it must be affirmatively shown that the injured party was in the exercise of due care at the time the accident occurred. At least, it must be made to appear that want of care on his part in no way contributed to bring about the injury, or helped to produce the accident for which compensation is sought."

In view of these authorities the following instructions asked by the appellee, and given by the court, were erroneous:—

"No. 2. A traveler upon a public highway in this state has a right to assume that a railroad company whose track crosses such highway will obey the law and give the signals required by law upon the approach of trains to such crossing, and (although the failure to give such signals does not release the traveler from exercising due care) if no such signals are given, and the view is obstructed, and there are no indications to the contrary, the traveler is not guilty of contributory negligence in assuming that no train is advancing upon such crossing within eighty rods thereof."

"No. 4. The burden is upon the plaintiff to show that there was no negligence upon her part contributing to the injury complained of; but this need not necessarily be shown by directly affirmative evidence, but may be shown by proving the facts and circumstances from which it may be inferred. If all of the circumstances under which the said injury occurred are put in evidence, and upon an examination of them nothing is found in acts or omissions showing contributory negligence, or ground for suspecting or inferring such negligence on the part of the plaintiff, the inference of care upon her part may be drawn from the absence of all appearance of fault, either positive or negative, on the part of plaintiff, in the circumstances under which the injury was received; and in considering the question of due care on her part, you have a right to take into consideration, together with the other facts and circumstances in the case, the instinct of self-preservation and the known and ordinary disposition of all persons to guard themselves against danger.

"No. 5. It was the duty of the defendant, by her employees in charge of such train, in approaching said crossing, when not less than eighty (80) nor more than one hundred (100) rods distant therefrom, to sound the whistle on such engine distinctly three (3) times, and to ring the bell upon such engine continuously from the time of sounding such whistle until such engine had fully passed said crossing; and although the

failure to give such warning of the approach of such train did not relieve the plaintiff from exercising due care to avoid the injury, yet if no such warning was given, the absence of such warning is a circumstance to be considered in determining whether such care was exercised by the plaintiff."

The second instruction could have led the jury to no other conclusion, if the view was in some way obstructed between that part of the highway over which the appellee was approaching the crossing and the railroad, and there had been a failure to sound the whistle attached to the locomotive engine or ring its bell within eighty rods of the crossing, and if she could have crossed in safety had the approaching train been eighty rods away, than that she was not guilty of contributory negligence, even though she drove upon the crossing without stopping to look or listen for an approaching train. In other words, from a slight obstruction of the view, and a failure to ring the bell or sound the whistle, the jury might infer want of contributory negligence in attempting to cross the railroad track under any circumstances which would have made it reasonably safe on the supposition that the engine and train were eighty rods away.

By the fourth instruction the jury are told, substantially, that if there is nothing in the evidence tending to show contributory negligence, they may, without proof, infer there was no such negligence.

By the fifth instruction the jury are told that if the whistle was not sounded nor the bell rung, this was a circumstance tending to show want of contributory negligence, and as a logical sequence (if it were a circumstance in that direction), the jury were told that they might find therefrom that it was sufficient to establish the fact, as it was for them to determine as to the weight of the evidence.

This very instruction may have misled the jury, and caused them to find want of contributory negligence.

The court should have given instructions numbers 8, 8, and 11, or their equivalent, asked by the appellant, as they stated the law correctly, and were applicable to the evidence: —

"No. 8. The burden is on the plaintiff to show, by a preponderance of the evidence, that she and her father vigilantly used their eyes and ears to ascertain if a train of cars was approaching, and if this has not been shown to you by a preponderance of the evidence, the plaintiff cannot recover."

"No. 8. When a person crossing a railroad track is injured by collision with a train, the fault is, *prima facie*, her own, and she must show affirmatively that her fault or negligence did not contribute to the injury, before she is entitled to recover for such injury."

"No. 11. The fact that the train was behind time, and was running faster than its usual speed at the crossing to make up time, did not excuse the plaintiff or her father from exercising the care and caution required of them when the train was on time, and running at its usual rate of speed at that crossing."

In *Hinckley v. Cape Cod R. R. Co.*, 120 Mass. 257, it is said: "Mere proof that the negligence of the defendant was a cause adequate to have produced the injury will not enable a plaintiff to recover, as it does not necessarily give rise to the inference of due care upon his part, proof of which is essential to his case": See *Sherlock v. Alling*, 44 Ind. 184.

In *Indiana etc. R'y Co. v. Greene*, 106 Ind. 279, 55 Am. Rep. 736, it is further said: "The facts and circumstances illustrating the conduct of the injured person at the time of the accident must be made to appear. If from these the inference can be drawn that proper caution was exercised, it may then be said the presumption of contributory negligence has been affirmatively removed." The trial court in that case gave the following instruction: "The allegation that the injury occurred without the fault or negligence of the plaintiff's intestate must be proved by the plaintiff; but at the same time it is a negative averment, and if the plaintiff has shown by the evidence that the injury occurred as charged, resulting in the death of the plaintiff's intestate, and that it was caused by the negligence of the defendant as charged, without showing any contributory negligence or ground for inferring or reasonably suspecting such negligence, she will be entitled to recover without making direct and affirmative proof on that subject. In the absence of circumstances to show or suggest it, there is no presumption of contributory negligence."

This instruction was held to be erroneous, and the court said, speaking of the appellant: "He must show the facts, as well those which relate to his share in the transaction as those which relate to the defendant's, and if upon the whole case the inference of negligence arises against the defendant, and of due care on his part, he may recover. The fact that a person traveling on a highway comes in collision with a train on

a railway crossing is of itself sufficient to suggest a presumption of contributory negligence against him in a suit for compensation": *Cincinnati etc. R. R. Co. v. Butler*, 103 Ind. 31; *Hathaway v. Toledo etc. R'y Co.*, 46 Ind. 25. See *Toledo etc. R'y Co. v. Brannagan*, 75 Ind. 490, upon the last proposition above.

It is the rule that a person, before crossing a railroad track, must stop, look, and listen, and it applies to pedestrians as well as to others: *Aiken v. Pennsylvania R'y Co.*, 130 Pa. St. 380; 17 Am. St. Rep. 775; *Butler v. Gettysburg etc. R. R. Co.*, 126 Pa. St. 160.

In *Allen v. Maine etc. R. R. Co.*, 82 Me. 111, it is said: "The evidence shows that at twenty-five or thirty feet from the crossing, the approaching train from Bath might have been seen by the plaintiff several hundred feet distant from the crossing. The plaintiff did not look in that direction until his horse's forefeet were between the rails. Was the neglect on his part to look in that direction a want of ordinary care and prudence? Is a traveler justified in driving upon a railroad crossing, in the absence of safety signals giving him the right to cross, without looking for an approaching train? It has been many times decided in this court that the traveler, before crossing a railroad, must both look and listen. . . . If the crossing at which the plaintiff was injured is so constructed that an approaching train cannot be seen until a traveler comes very near to the railroad track, common prudence requires him to approach at such speed that when an approaching train may be seen he may be able to stop, and allow such train to pass."

To the same effect are our own cases: *Cincinnati etc. R. R. Co. v. Butler*, 103 Ind. 31, and cases cited; *Indiana etc. R'y Co. v. Greene*, 106 Ind. 279; 55 Am. Rep. 736. See, upon these different propositions, *Chicago etc. R'y Co. v. Hedges*, 118 Ind. 5; *Cones v. Cincinnati etc. R'y Co.*, 114 Ind. 328; *Ohio etc. R'y Co. v. Hill*, 117 Ind. 56; *Lake Shore etc. R'y Co. v. Pinchin*, 112 Ind. 592; *Indiana etc. R'y Co. v. Hammock*, 113 Ind. 1.

In the light of these authorities the following instruction requested by the appellee, and given by the court, was erroneous:—

"No. 8. There is no rule of law which requires a traveler upon a public highway, in approaching a railroad crossing, to stop his team still. But, in determining the question of

plaintiff's contributory negligence, it is for you to say whether the course pursued by the plaintiff was such as would have been adopted by an ordinarily cautious and prudent person, in the exercise of reasonable care to avoid injury, under the facts and circumstances of this case as disclosed by the evidence. And I leave it for you to say whether there were such obstructions to the view of the train that did the injury, and such lack of warning on the part of the defendant of its approach, as would lead an ordinarily cautious and prudent man, in the exercise of reasonable care to avoid injury, to believe that no train was approaching within such distance of the crossing as to make his endeavor to pass the same dangerous."

From this instruction the jury could well infer, if it appeared that there was some lack of warning that the train was approaching the crossing, and that the view between the appellee and the approaching train was obstructed, that it then became a question for their determination as to whether such lack of warning, together with the obstructed view, were sufficient to lead a person of ordinary prudence and judgment to the conclusion that there was no train approaching within such a distance as to render it unsafe for the appellee and her father to attempt to pass over the track; and if so, then they were not guilty of negligence in attempting to pass over without first stopping and exercising their senses of hearing and sight.

In our opinion, instruction number 15, asked by the appellant, contained a correct statement of the law, and should have been given. This instruction reads thus:—

"No. 15. If there were any obstructions to sight or hearing in the direction of the approaching train as the plaintiff and her father neared the crossing, the obstructions required increased care on the part of the plaintiff and her father on approaching the crossing. In such case the care must be in proportion to the increase of the danger that may come from the use of the highway at such a place."

When applied to the evidence in the case, all of the foregoing instructions asked by the appellant were exceedingly pertinent as well as proper.

While we do not condemn instruction number 1, asked by the appellee, and given by the court in the abstract, we think that there was no evidence which made it pertinent, and that it was calculated to mislead the jury. The said instruction is as follows:—

"No. 1. If you find from the evidence that the plaintiff was injured by the defendant's train while traveling upon a public highway, as alleged in her complaint, that the whistle was not sounded and the bell rung, as required by law, as said train approached said crossing, and that plaintiff was misled by defendant's failure to give such warning, and without fault or negligence on her part, and without notice of the approach of said train, was placed in a position of great peril, and in the excitement of that peril, and in the effort to escape, made a mistake as to the proper course to be pursued, and injury resulted, such error of judgment is not contributory negligence, and will not bar a recovery by her for the injury sustained."

We may add further, that we find no evidence tending to rebut contributory negligence on the appellee's part; in view of the authorities, not a circumstance.

As to the circumstances which found the appellant and her father on the crossing when the misfortune overtook them, the evidence is an entire blank. Whether or not they saw the train approaching, or heard the sound which a moving train gives out, and were deceived as to the distance it was from them, and attempted to cross the track notwithstanding, we do not know. The rate of speed at which they approached the crossing, and whether or not they stopped and exercised their senses of hearing and sight, are facts which do not appear in the evidence.

In view of the authorities which we have cited, and especially the cases of *Indiana etc. R'y Co. v. Greene*, 106 Ind. 279, 55 Am. Rep. 736, and *Cincinnati etc. R. R. Co. v. Butler*, 103 Ind. 31, the case at bar seems to have been tried upon a theory entirely erroneous. The case of *Pittsburgh etc. R'y Co. v. Martin*, 82 Ind. 476, relied upon by the appellee, is not in harmony with our earlier cases, and is out of line with those more recent, the later cases following the earlier ones, and upon the questions involved in the present case cannot be regarded as an authority since the case of *Cincinnati etc. R. R. v. Butler*, 106 Ind. 31. The judgment must be reversed.

Judgment reversed, with costs.

NEGLIGENCE—RAILWAY CROSSINGS—BURDEN OF PROOF.—One injured at a railway crossing must establish his freedom from contributory negligence by showing that he approached the crossing with care and prudence: *Brickell v. New York etc. R. R. Co.*, 120 N. Y. 290; 17 Am. St. Rep. 648, and note; *Ohio etc. R'y Co. v. Hill*, 117 Ind. 58.

NEGLIGENCE — RAILWAY CROSSINGS — DUTY TO STOP, LOOK, AND LISTEN. — Persons walking or driving, when about to cross a railway track, must stop, look, and listen for approaching trains; a failure so to do is not merely evidence of negligence, but negligence itself: *Aiken v. Pennsylvania R. R. Co.*, 130 Pa. St. 390; 17 Am. St. Rep. 775, and note; *Marty v. Chicago etc. R'y Co.*, 38 Minn. 108; *Cullen v. President etc. of Canal Co.*, 113 N. Y. 667; *Indiana etc. R'y Co. v. Hammock*, 113 Ind. 1; *Young v. New York etc. R'y Co.*, 107 N. Y. 500; *Bloomfield v. Burlington etc. R. R. Co.*, 74 Iowa, 607.

BOWEN v. WICKERSHAM.

[124 INDIANA, 404.]

JUDGMENT AND JUDICIAL SALE, DESCRIPTION OF PROPERTY IN. — Where one claims through a judicial sale, it must appear from the decree and deed through which he claims that the title to the property claimed is in him. If the decree and deed are so defective that it cannot be ascertained by inspection or from *data* which they furnish what property was in fact sold, or if, in order to ascertain the intention of the officer in selling, it becomes necessary to institute an extrinsic inquiry, the deed is void, if uncertain.

DESCRIPTION OF PROPERTY IN A DECREE OF SALE. — A decree directing the sale of a parcel of land, except such parcels as have before been laid out in town lots by James Roach, and have been sold and conveyed prior to the execution of a designated mortgage, is invalid for want of description, when there is nothing in the record furnishing *data* by which to ascertain what tracts had been laid out in town lots and sold and conveyed.

J. Applegate and C. R. Pollard, for the appellant.

W. C. Smith and G. W. Julian, for the appellees.

MITCHELL, J. Bowen sued Wickersham and others, in ejectment, to recover the possession of lot numbered 9 in the town of Mortonville, in Carroll County. The plaintiff's only claim of title rests upon a decree of foreclosure and a sale and conveyance made in pursuance thereof by the sheriff of Carroll County.

The essential part of the description of the land in controversy, as contained in the decree, advertisement, and deed, is as follows: "Twenty acres out of the northwest fractional quarter of section 29, in township 25 north, of range 2 west, bounded as follows: Commencing at low-water mark on the north bank of Deer Creek south of an oak witness-tree of the old survey; thence south parallel with the section line forty-seven and one half rods; thence south with the section line to Deer Creek; thence down said creek with the meanderings thereof to the place of beginning, . . . except such portions

of the above-described tracts of land as have heretofore been laid out in town lots by James Roach, and have been by him sold and conveyed prior to the execution of the mortgage herein."

There was evidence tending to show that the lot in controversy was embraced by the general description above, and that it was one of the town lots laid out by Roach; but it did not appear whether it had been sold and conveyed at the time the mortgage mentioned in the decree was executed, nor is there anything in the record of the present case to indicate that the decree of foreclosure was taken upon a mortgage executed to the plaintiff. If it should be conceded that the general description of the twenty-acre tract, read in connection with the testimony of the surveyor, was sufficient, still there is nothing in the decree or deed to indicate whether or not the foreclosure sale and subsequent conveyance embraced the lot in controversy.

In order to maintain ejectment, the burden rests upon the plaintiff to make out a title to the land in dispute in himself, and as he claims through a judicial sale, it must appear from the decree and deed through which he claims, without the aid of extrinsic evidence, that the title to lot numbered 9 is in him.

It does not appear from the record that the lot in dispute was embraced in the foreclosure proceeding, nor in the sale and conveyance made by the sheriff to the plaintiff. In order to ascertain whether or not it was so sold and conveyed, it would be necessary to institute an inquiry outside of the record so as to ascertain the date of the mortgage upon which the decree was taken, and to determine whether or not the lot in controversy had been sold by Roach before that time.

A description in a deed or mortgage may be sufficient, even though it may be necessary on account of its imperfect or indefinite character, to aid the intention of the parties by averring and proving extrinsic facts. This rule has, however, no application to a description found in a decree of foreclosure, or in a conveyance made in pursuance thereof. Descriptions of land found in judicial decrees or sheriff's deeds cannot be reformed or aided by invoking the chancery powers of the court: *Lewis v. Owen*, 64 Ind. 446; *Dale v. Travelers Ins. Co.*, 89 Ind. 473.

Where the description as contained in a mortgage or other

instrument is imperfect or indefinite, the land actually mortgaged or conveyed should be accurately described in the bill or complaint to foreclose, and the description in the decree should be so reformed that the officer may know on what land to execute the order of the court: *Struble v. Neighbert*, 41 Ind. 344; *Jones on Mortgage*, sec. 1462. The sheriff must be able to identify the property from the description contained in the decree, and the purchaser can only be put in possession of the land definitely described in the deed: *Cunningham v. McCollum*, 98 Ind. 38; *Rumels v. Kaylor*, 95 Ind. 503.

If the decree and deed are so defective that it cannot be ascertained by inspection, or from data which they furnish, what property was in fact sold, or if in order to ascertain the intention of the officer in selling, it becomes necessary to institute an extraneous inquiry, the deed is void for uncertainty: *Freeman on Executions*, sec. 281. Thus where a tract of land had been laid off into town lots, some of which had been sold, it was held that a sale by the sheriff of the owner's interest in the land, described generally, was too vague to convey title to any particular lot: *Evans v. Ashley*, 8 Mo. 177.

It cannot be ascertained from an inspection of the decree and deed, or from any data contained therein, whether lot numbered 9 was or was not sold to the plaintiff, and as it was incumbent on him to make out an affirmative title before his right to recover was established, the judgment for the defendant was right.

Judgment affirmed, with costs.

DESCRIPTION IN SHERIFF'S DEED. — In a sheriff's deed of land, the premises should be described with reasonable certainty, or nothing will pass thereunder: *Jackson v. Delancy*, 13 Johns. 586; 7 Am. Dec. 403; *Broughton v. Birchmore*, Harp. 300; 18 Am. Dec. 654. Compare *Hoffman v. Anthony*, 6 R. L. 282; 75 Am. Dec. 705.

WHITE SEWING-MACHINE COMPANY v. GORDON.

[124 INDIANA, 485.]

EVIDENCE — COMPARISON OF HANDS. — PAPERS WHICH ARE NOT IN EVIDENCE IN THE CASE, and the signatures to which are not admitted to be genuine, cannot be used for the purpose of making comparison between the signatures thereto attached and the signatures on a bond or other paper in a suit.

CROSS-EXAMINATION. — The extent to which cross-examinations shall be conducted is largely in the discretion of the trial court, and such discretion will not be interfered with unless it clearly appears that it was abused to the injury of the party complaining.

EVIDENCE. — PHOTOGRAPHS ARE SECONDARY EVIDENCE, and therefore not admissible when the original can be produced in court.

EVIDENCE. — MICROSCOPIC ENLARGEMENT OF SIGNATURE IS NOT ADMISSIBLE in evidence when the original signature is in court.

EVIDENCE. — LETTERS AND OTHER PAPERS ARE NOT ADMISSIBLE IN EVIDENCE WHEN THE SIGNATURES THERETO ARE NOT ADMITTED TO BE GENUINE, and they are not relevant to any issue in the case, and the only object of putting them in evidence must be for the purpose of comparing the signatures thereon with the signature on the bond in suit.

M. B. Johnson, W. G. Cruzon, and F. M. Passera, for the appellant.

D. R. Best and E. A. Bratton, for the appellee.

COFFEY, J. This was a suit by the appellant against the appellee upon a bond which the complaint alleges was executed to the appellant, by the appellee, as surety of one Bush Gordan.

The appellee pleaded *non est factum*. The cause was tried by a jury, resulting in a verdict for the appellee, upon which the court rendered judgment.

The error assigned is, that the court erred in overruling the motion for a new trial.

It is claimed by the appellant that the court erred in refusing to permit it to prove by Asa T. Beebe and others, witnesses called by the appellee, on cross-examination, that in their opinion the signatures to two letters, four promissory notes, and a certain claim-file were the genuine signatures of the appellee. The two letters, a witness called by the appellant testified he had received from the appellee, and that they, among other things, had given him his acquaintance with the appellee's handwriting, and that from his acquaintance with the appellee's handwriting he believed the signature to the bond in suit was genuine.

The four promissory notes were produced by a witness on

behalf of the appellant, who testified that he was acquainted with the appellee's signature; that one of the means by which he became acquainted with it was by seeing it to said notes, and that in his opinion the signature to the bond in suit was the appellee's genuine signature.

The claim-file was identified by a witness for the appellant, who testified that the same was acknowledged before him, and that he was acquainted with the handwriting of the appellee, and that, in his opinion, the signature to the bond in suit was his genuine signature.

The letters, promissory notes, and claim-file were not papers in this cause, nor were the signatures thereto admitted to be the genuine signatures of the appellee, nor were they read in evidence. They could not, under these circumstances, be used for making comparison between the signatures thereto attached and the signatures to the bond in suit: *Burdick v. Hunt*, 43 Ind. 381; *Huston v. Schindler*, 46 Ind. 38; *Jones v. State*, 60 Ind. 241. Furthermore, these papers had not been referred to by the witnesses sought to be cross-examined, and were not in any way connected with their testimony; they were not expert witnesses. For these reasons the testimony sought to be elicited was not cross-examination. The court did not, under the circumstances, err in sustaining an objection thereto.

The extent to which a cross-examination shall be conducted is largely in the discretion of the trial court, and such discretion will not be interfered with unless it clearly appears that such discretion has been abused to the injury of the party complaining. For this reason we cannot say that the court erred in refusing to allow the appellant to prove by the appellee on cross-examination that the signatures to the notes and letters above referred to were genuine.

On the trial of the cause, the appellant offered, for the inspection of the jury, what purported to be a microscopic enlargement of the signature of the appellee to the bond in suit, and proved by a competent witness that he made it by hand from an image in the *camera lucida*. Upon objection made by the appellee, the appellant, by his counsel, stated to the court that he expected to prove by said witness that it was a microscopic enlargement, and a correct enlargement of the signature upon the bond, and that said enlargement showed that after the letter "o" in the word "Gordon" had been made, the pen was put aside to retouch it; but the court sustained

the objection, and excluded the enlarged microscopic signature. The witness, however, was permitted to testify fully in relation to said signature, and to its appearance in its enlarged condition.

It is claimed by the appellant that the court erred in excluding from the inspection of the jury the enlarged microscopic signature.

In the case of *Marcy v. Barnes*, 16 Gray, 161, 77 Am. Dec. 405, it was held that it was not improper to permit the jury to compare magnified photographic copies of genuine signatures with similar copies of the disputed signature; but in this case it was not proposed to compare the enlarged copy of the disputed signature with a similar one of a signature admitted to be genuine. The offer was to furnish such enlarged copy merely for the inspection of the jury.

It seems to be well established that photographs are not admissible in evidence when the original can be produced in court, photographs at best being secondary evidence: Rogers on Expert Testimony, sec. 144; *Matter of Foster's Will*, 34 Mich. 23; *Eborn v. Zimpelman*, 47 Tex. 503; 26 Am. Rep. 513; *Niller v. Johnson*, 27 Md. 6; *Tome v. Parkersburg etc. R. R. Co.*, 39 Md. 36; 17 Am. Rep. 540.

The enlarged signature offered to the jury in this case was, at most, a mere copy, while the original was in court. Had it been desirable that the jury should examine the signature in question with the aid of a microscope, we know of no reason why they should not have been permitted to do so; but the admission of what purported to be an enlarged copy of such signature opened the door to innumerable collateral questions. We do not think the court erred in refusing to submit to the inspection of the jury this enlarged copy of the signature in question, as it was not proposed to compare it with enlarged copies of signatures admitted to be genuine.

It is also claimed by the appellant that the circuit court erred in refusing to admit in evidence the letters and promissory notes hereinbefore referred to in this opinion. In the exclusion of these letters and notes, we do not think the court erred. The witnesses having them in possession had the right to refer to them for the purpose of refreshing their memories before testifying, and in corroboration of their testimony, addressed to the court, upon the subject of their competency to testify; but they were not competent testimony to go to the jury: *Thomas v. State*, 103 Ind. 419.

They had no connection whatever with the case on trial. As the signatures thereto were not admitted to be genuine, they could not, as we have seen, be compared with the signature to the bond in suit. There was no issue in the case upon which they could have thrown any light.

Finally, it is contended by the appellant that the verdict of the jury is not supported by the evidence in the cause.

The appellee testified, on the trial of the cause, that he did not sign or execute the bond in suit. There is much testimony in the cause tending to corroborate him. The record presents a case where there is a conflict in the evidence upon all the material points in the case. It has been so often decided and is so well settled that this court will not undertake to weigh conflicting evidence, that we need cite no authority upon the subject.

There is no error in the record for which the judgment should be reversed.

Judgment affirmed.

CROSS-EXAMINATION. — The extent to which a cross-examination may be carried rests in the sound discretion of the court: *Hinchcliff v. Koontz*, 121 Ind. 422; 16 Am. St. Rep. 403; and the exercise of such discretion, if not abused, is not reviewable upon appeal: *Birmingham etc. Ins. Co. v. Puizer*, 126 Ill. 329; 9 Am. St. Rep. 599.

EVIDENCE — PHOTOGRAPHS. — As to the proof of handwriting by photographic copies, see *Eborn v. Zimpelman*, 47 Tex. 503; 26 Am. Rep. 315, and note 319-321. For photographs as evidence, generally, see *Dyson v. New York etc. R. R. Co.*, 57 Conn. 9; 14 Am. St. Rep. 82; *Brown v. Metropolitan L. Ins. Co.*, 66 Mich. 306; 8 Am. St. Rep. 894; *Duffin v. People*, 107 Ill. 113; 47 Am. Rep. 431; *In re Jessup*, 81 Cal. 408; *Verran v. Baird*, 180 Mass. 141.

EVIDENCE — PROVING HANDWRITING BY COMPARISON. — As to the admissibility of evidence of handwriting, founded upon a comparison with other writings admitted or proved to be genuine, see *Futter v. Fox*, 101 N. C. 119; 9 Am. St. Rep. 27, and note. Such evidence is inadmissible when the writings produced for comparison are not proved or admitted to be genuine: *Bray v. Flickinger*, 79 Iowa, 313; *Walker v. Steele*, 121 Ind. 437. Parol testimony to establish by comparison the handwriting of the signature to a paper which is not produced is not admissible: *Mayer v. Adams*, 76 Tex. 448. But the opinion of a witness as to the genuineness of a disputed lost signature which he has seen, based upon a comparison of his recollection of it with a signature of the same person, in evidence, and admitted to be genuine, is admissible: *Hammond v. Wolf*, 78 Iowa, 228.

KINCAID v. INDIANAPOLIS NATURAL GAS CO.

[121 INDIANA, 677.]

HIGHWAY. — ABUTTERS ON A PUBLIC SUBURBAN HIGHWAY HAVE A RIGHT therein distinct from that of the public, which the legislature cannot take away, except to appropriate it to a public use upon payment of compensation. The public has no interest in such a highway, other than the right to pass and repass over it.

HIGHWAY. — LAYING GAS-PIPES IN A SUBURBAN ROAD IS THE IMPOSITION OF AN ADDITIONAL BURDEN, for which compensation must be made to the land-owner.

INJUNCTION WILL NOT BE ISSUED AT THE SUIT OF AN ABUTTING LAND-OWNER to prevent the maintenance of a line of gas-pipes in a public highway, where large sums of money have been expended by the gas company on the faith of a license granted to it by the board of commissioners, and the complaining land-owner, with full knowledge of all the facts, made no objection until the company had constructed its main line and system at great expense. His remedy is by action to recover damages for the invasion of his rights.

J. A. New, S. E. Urnston, R. R. Stephenson, and W. R. Fertig, for the appellant.

A. F. Shirts, M. Vestal, T. J. Kane, and T. P. Davis, for the appellees.

ELLIOTT, J. The board of commissioners of Hamilton County granted the Indianapolis Natural Gas Company the right to lay pipes in a free gravel road constructed under the statute of this state at the expense of the land-owners. The appellant is an abutting owner in fee of land along the line of the highway. Prior to the time this suit was brought, the company had constructed a system of gas-works, and had laid in the highway a line of pipes for the purpose of supplying the citizens of the city of Indianapolis and others with natural gas. In the prosecution of this work the company had expended many thousands of dollars. To make the system effective, and to successfully supply gas as it had undertaken to do, it became necessary for the company to extend its line of pipes so as to connect its main line and system with additional gas-wells which it had drilled, and of which it was the owner. This it was undertaking to do at the time the appellant sued out the injunction issued in this case. The trial court dissolved the temporary injunction, and refused to grant a perpetual injunction. From this judgment the appellant prosecutes his appeal.

The license granted by the board of commissioners was
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effectual to convey the right of the county, such as it had, in the highway, but it did not affect private property rights: *Burkam v. Ohio etc. Ry Co.*, 122 Ind. 344.

The owner of the fee in a suburban highway has a special proprietary right distinct from that of the public, and this right cannot be taken without compensation. In a case decided in 1855 it was held that abutters have a private right distinct from that of the public, which even the legislature cannot take away except to appropriate to a public use upon payment of compensation: *Common Council v. Croas*, 7 Ind. 9. This doctrine has been steadily adhered to by this court: *Haynes v. Thomas*, 7 Ind. 38; *Cox v. Louisville etc. R. R. Co.*, 48 Ind. 178; *Pettis v. Johnson*, 56 Ind. 139; *State v. Berdetta*, 73 Ind. 185; *Ross v. Thompson*, 78 Ind. 90; *Cummins v. City of Seymour*, 79 Ind. 491; 41 Am. Rep. 618; *City of Logansport v. Shirk*, 88 Ind. 563; *City of Indianapolis v. Kingsbury*, 101 Ind. 200, 211; 51 Am. Rep. 749; *Terre Haute etc. R. R. Co. v. Bissell*, 108 Ind. 113; *Town of Rensselaer v. Leopold*, 106 Ind. 29; *City of Lafayette v. Nagle*, 113 Ind. 425.

The rule declared by our own cases is in harmony with the very ancient and well-settled rule that the public acquires, except in cases where the seizure of the fee is authorized, nothing more than a right to pass and repass, and the great weight of authority sustains the doctrine laid down by our decisions.

There is an essential distinction between urban and suburban highways, and the rights of abutters are much more limited in the case of urban streets than they are in the case of suburban ways. We note the distinction between the classes of public ways, and declare that the servitude in the one class is much broader than it is in the other, but it is not necessary to here mark with particularity the difference between the two classes of public ways, for we are here concerned only with suburban ways.

Subject to the right of the public, the owner of the fee of a rural road retains all right and interest in it. He remains the owner, and, as such, his rights are very comprehensive: *Brookville etc. Co. v. Butler*, 91 Ind. 134; *Shelbyville etc. T. P. Co. v. Green*, 99 Ind. 205; *Dovaston v. Payne*, 2 H. Bl. 527; *Peck v. Smith*, 1 Conn. 103; *Trustees etc. Society v. Auburn etc. R. R. Co.*, 3 Hill, 567.

That the appellant has a special private interest in the land upon which the highway is located, which cannot be

taken from him without compensation, is quite clear upon principle and authority.

The appropriation of the land for a rural highway did not entitle the local officers to use it for any other than highway purposes, although they did acquire a right to use it for all purposes legitimately connected with the local system of highways. A use for any other than a legitimate highway purpose is a taking within the meaning of the constitution, inasmuch as it imposes an additional burden upon the land; and whenever land is subjected to an additional burden, the owner is entitled to compensation. The authorities, although not very numerous, are harmonious upon the proposition that laying gas-pipes in a suburban road is the imposition of an additional burden, and that compensation must be made to the owner: *Bloomfield etc. Co. v. Calkins*, 62 N. Y. 386; *Bloomfield etc. Co. v. Calkins*, 1 Thomp. & C. 549; *Bloomfield etc. Co. v. Richardson*, 63 Barb. 437; *Sterling's Appeal*, 111 Pa. St. 35; 56 Am. Rep. 246; *Webb v. Ohio Gas Fuel Co.*, 16 Weekly Law Bulletin, 121.

The same principle is declared in the cases which hold that drainage pipes cannot be laid in rural highways except for public drainage purposes connected with the system of highways: *Murray v. Gibson*, 21 Ill. App. 488; *Indianapolis etc. R. R. Co. v. Hartley*, 67 Ill. 439; *Board of Trade etc. Co. v. Barnett*, 107 Ill. 507; 47 Am. Rep. 453. The cases to which we have referred are well reasoned and are founded on solid principle. We have no hesitation in concluding that the laying of the pipes in the highway was a taking of the appellant's property within the meaning of the constitution, and that he is entitled to compensation.

It does not follow, however, that a land-owner entitled to compensation for property appropriated to a public use can always maintain injunction. It remains, therefore, to inquire and decide whether the appellant can maintain this suit; for if he is not entitled to an injunction, he cannot succeed.

The use to which the line of the highway was appropriated was a public one. There can be no doubt that the work of supplying cities with natural gas is a public one for which property may be appropriated under the right of eminent domain: *State v. Indiana etc. Mining Co.*, 120 Ind. 575; *Carothers v. Philadelphia Co.*, 118 Pa. St. 468; *Pennsylvania Natural Gas Co. v. Cook*, 123 Pa. St. 170; *Johnston's Appeal*, Penn. Nov. 15, 1886.

There was an assertion of a right to use the highway, and the gas company had expended large sums of money on the faith of the license granted to it by the board of commissioners. It had assumed to use the highway for a public purpose, and many citizens had acquired rights upon the faith of the successful and effective prosecution and conduct of the work and business undertaken by the company. The appellant, with knowledge of the facts, made no objection until the completion of the main line and system, but delayed until they had been completed, and then asked an injunction. To grant the relief he seeks will, it is clearly inferable, seriously impair the rights of the public as well as those of the gas company. We are satisfied that upon the case made by the evidence, the appellant is not entitled to an injunction. In adjudging that he has no right to an injunction, we do not hold that he may not, in a proper case, recover damages for the invasion of his legal rights. What we here decide is, that the case made is not one justifying resort to the extraordinary remedy of injunction. The effect of our decision is, that he has mistaken his remedy.

The work in which the gas company is engaged is one in which the general community have an interest, and to arrest the work by injunction would do great injury to many citizens. Persons other than the company have an interest, and they are so numerous that it is the duty of the courts to protect that interest, where it can be done without materially impairing the rights of any private citizen; and that can be done in this instance, for the appellant, in the appropriate action and upon making a proper case, can be fully compensated in damages for all injury that he may have suffered. There is present here an element of public policy which exerts a controlling influence. The good of the community forbids that one who occupies such a position as the appellant does should be permitted to arrest work essential to the successful discharge of the company's duty to supply the community with fuel in the form of natural gas. Public policy, as has been demonstrated in analogous cases, requires that the rights of the community should be protected, and the land-owner left to his remedy at law: *Louisville etc. R'y Co. v. Beck*, 119 Ind. 124; *Louisville etc. R'y Co. v. Soltwedde*, 116 Ind. 257; 9 Am. St. Rep. 852; *Bravard v. Cincinnati etc. R. R. Co.*, 115 Ind. 1; *Sherlock v. Louisville etc. R'y Co.*, 115 Ind. 22; *Midland R'y Co. v. Smith*, 113 Ind. 233; *Indiana etc. R'y Co. v. Allen*, 113 Ind.

581. Nor does this rule operate unjustly, for the land-owner is not deprived of compensation; on the contrary, the right to compensation is left open to him, and it is his own fault if he does not recover full compensation for all the loss he has actually sustained. Blended with the element of public policy is another influential one, and that is this: The appellant, without objection, knowingly permitted the work to proceed until it reached a stage at which it would be ruinous to the company, which had invested such large sums of money, to stop it by injunction. These two elements, in their combined strength, certainly make a case in which an injunction should, upon plain principles of equity, be denied: *City of Logansport v. Uhl*, 99 Ind. 531, 544; 50 Am. Rep. 109; *Dodge v. Pennsylvania R. R. Co.*, 38 Am. & Eng. R. R. Cas. 180.

Judgment affirmed.

HIGHWAYS.—For the rights and remedies of a person over whose land a highway has been established, see *Mayhew v. Norton*, 17 Pick. 357; 28 Am. Dec. 360, and particularly note 303-306; *Adams v. Chicago etc. R. R. Co.*, 39 Minn. 236; 12 Am. St. Rep. 644, and note; *Theobald v. Louisville etc. R'y Co.*, 66 Minn. 279; 14 Am. St. Rep. 564, and note; *Kansas etc. R'y Co. v. Cuykendall*, 42 Kan. 234; 16 Am. St. Rep. 479.

CASES
IN THE
SUPREME COURT
OF
KANSAS.

BURLINGTON INSURANCE COMPANY v. GIBBONS.

[43 KANSAS, 15.]

INSURANCE—LIMITATIONS IN POLICY, HOW FAR BINDING ON ASSURED—
POWER OF LOCAL AGENT TO WAIVE CONDITIONS.—One who, in procuring insurance, acts in good faith, and without knowledge of any limitations upon the authority of the agent of the company effecting the insurance, may safely assume that the agent is a general agent of the company; that he stands in the place of the company, which will be bound by any terms or conditions to which he may agree while acting for the company in consummating the insurance. This rule does not apply, however, when the policy has already been executed and delivered to the assured, has gone into full force and effect, and gives notice upon its face of limitations upon the authority of the local agent, or upon all agents, except some particular agent, of the company. In such cases, the assured will be presumed to take notice of such limitations from the face of his policy, and will be bound by them, notwithstanding a waiver thereof by the local agent.

INSURANCE—WAIVER OF CONDITIONS IN POLICY BY LOCAL AGENT.—If an agent has authority only to solicit insurance and consummate the same, or to issue the policy, with no authority to subsequently change or waive any of its terms or conditions, any attempted change or waiver by him, after the policy has issued, is generally void; and in the absence of any showing to the contrary, it will ordinarily be presumed that the assured, or any person claiming under him, had knowledge of the terms and conditions of the policy. Hence, if the policy provides that it shall become void if the property insured shall become vacant, unoccupied, or uninhabited, without the consent of the secretary of the company indorsed on the policy, a waiver of this condition by the local agent, after the insurance is effected, is unauthorized, and renders the policy void.

Carroll and Sheldon, for the plaintiff in error.

Brayman and Stevens, for the defendant in error.

VALENTINE, J. This was an action on a fire insurance policy, brought in the district court of Miami County on March 7, 1887, by Ellen Gibbons, against the Burlington Insurance Company, of Burlington, Iowa, to recover \$150, and interest from November 27, 1886, for an alleged loss of that amount, occurring by fire at that date. The case was tried before the court without a jury, and judgment was rendered in favor of the plaintiff and against the defendant on December 13, 1887, for \$150 principal, and \$10.97 interest, total \$160.97; and to procure a reversal of this judgment, the defendant, as plaintiff in error, brings the case to this court.

The facts of the case are substantially as follows: On December 1, 1885, the Burlington Insurance Company insured for five years, and to the amount of \$150, a house belonging to Sarah A. Bixby, in the city of Paola, in said county. The policy contained, among others, the following provisions: "If there be any false representation, false swearing, or fraud by the assured, either before or after a loss; or if there be any other insurance, now or hereafter, whether valid or not, on the property hereby insured, or any part thereof; or if the above-mentioned premises shall be occupied or used so as to increase the risk, or be or become vacant, unoccupied, or uninhabited, or the risk be increased by the erection of adjacent buildings, or by any other means whatever; or if the property be sold or transferred or encumbered, in whole or in part, by mortgage, judgment, or liens; or if this policy shall be assigned, either before or after a loss; or if the premium note or notes, or any part or installment thereof shall be overdue and unpaid, — then, unless the consent of the secretary is indorsed thereon in each and every one of the above cases, this policy is void."

On August 4, 1886, Mrs. Bixby sold the aforesaid property and assigned the aforesaid policy to Minnie E. Shigley, and on the next day the insurance company, by its president, consented to the same. Afterward, Minnie E. Shigley was married and became Minnie E. Stanley, and afterward her mother, Mrs. Ellen Gibbons, attended to her property and insurance for her. On November 18, 1886, the property became vacant; and with reference to this vacancy the principal question in this case arises, and we shall have more hereafter to say with respect thereto. On November 27, 1886, the property was totally destroyed by fire. On February 4, 1887, Mrs. Stanley sold and transferred all her interest in the foregoing

policy and her claim thereon against the insurance company to her mother, Mrs. Gibbons. The insurance company refusing to pay the loss, or any portion thereof, Mrs. Gibbons, on March 7, 1887, commenced this action against the insurance company as aforesaid. The defendant (plaintiff in error), as shown by the brief of its counsel, contends as follows: "The insurance company contends that at the time of the alleged loss, November 27, 1886, said policy of insurance, by the terms thereof, and by the acts of the holders thereof, had become null and void, and was then of no binding force or effect; and that the insurance company was not then and is not liable thereon in any sum whatever, for the reason that at the time of the alleged loss the dwelling-house covered by said policy of insurance was then, with the knowledge and consent of the then holder of said policy No. 186,102, and without the knowledge or consent of said insurance company, 'wholly vacant and unoccupied,' and had been so vacant and unoccupied for a number of days prior to November 27, 1886, contrary to and in violation of the terms of said policy and contract of insurance. And further, that if there was any liability on the part of the insurance company, which it explicitly denies, that the damage to said dwelling-house was not \$150, but was less than \$100."

The plaintiff admits that at the time of the fire the property was vacant, unoccupied, and uninhabited, and also admits that the consent of the secretary of the company had not been indorsed upon the policy, nor even given; but it is contended by the plaintiff that the consent of the company to such vacancy had nevertheless been given, and that it was given by J. W. Morehead, the agent of the company who procured the policy, and who presumptively had full authority from the company to give such consent. The insurance company admits that Morehead was its agent, but claims that he was only a "soliciting agent to transact business for said company, having or keeping an office or principal place of business at Paola, in the county of Miami," as provided in a certain appointment on file in the office of the department of insurance at Topeka, Kansas; and that he had no other or further authority, and no authority to consent to a vacancy of the property insured or to waive any of the terms or conditions of the insurance policy.

It appears that the defendant was an insurance company of Burlington, Iowa; that J. W. Morehead was its agent at

Paola, Kansas; and that the insurance in this case was effected through Morehead's agency. The building insured was to be occupied, as the policy shows, by "owner or tenant." Under the evidence and findings of the court below, it must be taken as a fact—although the evidence upon the subject was conflicting—that Morehead gave his oral consent, about two weeks prior to the fire, that the property might be and remain vacant for a period of thirty days, or until a tenant could be procured, not exceeding that time. Morehead testified that he never gave any such consent, and Mrs. Gibbons testified that he did. The house had been in fact vacant only nine days when the fire occurred which destroyed it. Morehead's agency, as the evidence shows, was limited as the defendant contends, but it does not appear that Mrs. Bixby or Mrs. Stanley or Mrs. Gibbons ever had any knowledge or notice of any such limitations further than the policy itself may show. In fact, we think they had a right to believe that the agency of Morehead was as comprehensive and extensive as his acts in procuring the insurance would indicate, except as the policy itself may otherwise show. But just what he did in procuring the insurance is not shown. Everything with respect to that matter is left blank. His name is not even found in the policy, and is found on the back of the policy only as follows: "J. W. Morehead, Solicitor." The policy appears to have been signed by "John G. Miller, President," and by "Jacob Allen, Sec'y *pro tem.*" Whether these names were printed on the policy or written thereon we do not know, and whether they were placed thereon while the policy was in blank form, and before the blank was sent to Morehead, or whether the blank was first filled up by Morehead or some one else, and the signatures afterward placed thereon, we cannot tell. The copy brought to this court has the name of the president, Miller, printed thereon, but the name of the secretary *pro tempore* is written. Of course the judge of the court below, who saw the original policy, could know better with regard to all these matters than we can; and hence all presumptions from absence or silence in these respects we shall construe in favor of the plaintiff's right to recover upon the policy. But these presumptions relate only to absence or silence; for what is shown affirmatively by the policy, or contained in the policy, we must give full force and effect to, unless the same is shown affirmatively to have been waived by the consent of the parties.

It has generally been held that where a person, in procuring an insurance upon his property, acts in good faith and without any knowledge of any limitations upon the authority of the agent of the insurance company effecting the insurance, such person may assume that the agent is a general agent of the insurance company for that purpose; that he stands in the place of the company, and that the company will be bound by any terms or conditions, or any waiver of terms or conditions, which the agent may agree to while acting for the company in consummating the insurance. But we do not understand that this rule applies where the insurance policy has already been executed and delivered to the assured, where it has already gone into full force and effect, and where it itself gives notice upon its face of limitations upon the authority of the local agent or agents of the company, or upon all agents except some particular agent or agents. In such cases we understand that the assured will be presumed to take notice of such limitations from the face of his policy, and will, as a general rule, be bound by them: *Hartford Fire Ins. Co. v. Davenport*, 37 Mich. 609; *Cleaver v. Traders' Ins. Co.*, 65 Mich. 527; 8 Am. St. Rep. 908; *Hankins v. Rockford Ins. Co.*, 70 Wis. 1; *Enos v. Sun Ins. Co.*, 67 Cal. 621; *Hale v. Mechanics' Mut. Fire Ins. Co.*, 6 Gray, 169; 68 Am. Dec. 410; *Kyte v. Commercial U. Assurance Co.*, 144 Mass. 43; *Healey v. Imperial Fire Ins. Co.*, 5 Nev. 268; *Mitchell v. Lycoming Mut. Ins. Co.*, 51 Pa. St. 402; *Waynesboro Mut. Fire Ins. Co. v. Conover*, 98 Pa. St. 384; *Universal Mut. Fire Ins. Co. v. Weiss*, 106 Pa. St. 20; *Wilson v. Genesee Mut. Ins. Co.*, 14 N. Y. 418; *Marvin v. Universal Life Ins. Co.*, 85 N. Y. 278; 39 Am. Rep. 657; *Underwriters' Agency v. Sutherlin*, 55 Ga. 266. Where the agent has the authority only to solicit insurance or to effect or bring about the same, or to issue the policy of insurance, and has no authority to afterward change or waive any of its terms or conditions, any attempted change or waiver by him after the policy has been issued will generally be held to be void; and in the absence of any showing to the contrary, it will generally be presumed that the assured, or any person claiming under him, had knowledge of all the terms and conditions of the policy. In the present case it is provided in the policy and by its terms, among other things, that if the property insured shall "become vacant, unoccupied, or uninhabited, . . . then, unless the consent of the secretary is indorsed thereon, . . . this policy is void"; and as nothing has

been shown to the contrary in this case, it must be presumed that Mrs. Bixby, Mrs. Stanley, and Mrs. Gibbons had knowledge of these provisions. And yet they may not have had any such knowledge. These provisions, along with many other provisions tending to render the policy void upon certain conditions, were contained in a paragraph of the policy containing over seven hundred words, all printed in small letters, and covered over by the words "indemnity bond," printed in large letters. The law ought to be such that provisions printed in an insurance policy in such a covert, hidden, and obscure manner should be held to be absolutely void, unless it should first appear affirmatively that the assured had actual knowledge of such provisions.

In the case of *Hartford Fire Ins. Co. v. Davenport*, 37 Mich. 609, it was held that the insurance agent who issued the policy had no power to waive a clause contained in the policy, that the insurance should be void if the property should become vacant. To the same effect, and perhaps a stronger case, where the property was occupied by a tenant, is the case of *Harrison v. City Fire Ins. Co.*, 9 Allen, 231; 85 Am. Dec. 751. And with respect to vacancies, generally, rendering insurance policies void where the property is occupied by tenants, see the following cases: *Corrigan v. Connecticut Fire Ins. Co.*, 122 Mass. 298; *Sleeper v. N. H. Fire Ins. Co.*, 56 N. H. 401; *Dennison v. Phoenix Ins. Co.*, 52 Iowa, 457; *Fitchpatrick v. Hawkeye Ins. Co.*, 53 Iowa, 335; *Ætna Ins. Co. v. Meyers*, 63 Ind. 238; *Insurance Co. v. Wells*, 42 Ohio St. 519; *American Ins. Co. v. Padfield*, 78 Ill. 167. See also the following cases as having some application to this case: *Wustum v. City Fire Ins. Co.*, 15 Wis. 138; *Cook v. Continental Ins. Co.*, 70 Mo. 610; 35 Am. Rep. 438; *Ashworth v. Builders' Mut. Ins. Co.*, 112 Mass. 422; 17 Am. Rep. 117; *Meadows v. Hawkeye Ins. Co.*, 62 Iowa, 387; *Bartholomew v. Merchants' Ins. Co.*, 25 Iowa, 507; 96 Am. Dec. 65; *Merserau v. Phoenix Mut. Life Ins. Co.*, 66 N. Y. 274.

From the facts of this case as they now appear to this court, the plaintiff cannot recover, and therefore the judgment of the court below will be reversed, and the cause remanded for a new trial.

INSURANCE. — WAIVER OF CONDITIONS BY AGENTS: See note to *Farnum v. Phoenix Ins. Co.*, 17 Am. St. Rep. 248; note to *Wheaton v. North British etc. Ins. Co.*, 9 Am. St. Rep. 229-238. The assured must know what are the stipulations and conditions in the contract of insurance: *Cleaver v. Traders' Ins. Co.*, 71 Mich. 414; 15 Am. St. Rep. 275. And he cannot rely upon the powers

of an agent in opposition to the expressed limitations in the policy: *Clearer v. Traders' Ins. Co.*, 65 Mich. 527; 8 Am. St. Rep. 908; *Robinson v. Fire Ass'n. etc.*, 63 Mich. 90; *Continental Ins. Co. v. Ruckman*, 127 Ill. 364; 11 Am. St. Rep. 121. Compare *German Ins. Co. v. Gray*, 43 Kan. 497; *post* p. 150. The policy stipulating that no agreements by agents shall be binding except when signed and indorsed upon the policy, an oral waiver of a condition in the policy by a local agent is void if made after the execution of the policy: *Knudson v. Hecla Ins. Co.*, 75 Wis. 198. An agent may waive a stipulation signed only by himself and attached to the policy of insurance upon a stock of goods: *Niagara F. Ins. Co. v. Brown*, 123 Ill. 356. In *Wilkins v. State Ins. Co.*, 48 Minn. 177, it is decided that where it is provided in a policy of insurance that the contract shall not be binding till actual payment of the premium, and that no waiver of condition shall be valid unless in writing signed by the company's secretary, the company is not responsible for a loss occurring before the payment of the premium, notwithstanding the local agent pretended to have waived the immediate payment of the premium.

BROQUET v. WARNER.

[48 KANSAS, 48.]

MORTGAGE FORECLOSURE. — HOLDERS OF OUTSTANDING TAX LIENS MAY BE BROUGHT IN, and their validity determined, in an action to foreclose a mortgage.

TAX SALES. — WHO MAY ACQUIRE VALID TAX TITLE. — If husband and wife are out of possession, he may, after the death of a testator, acquire a valid tax title to the land of the heirs of which his wife is one, and title so acquired is superior to the rights of a mortgagee of the testator.

ACTION by T. W. Warner, as administrator of J. S. Willard, deceased, against Mary Broquet, Ernest Broquet, and other defendants, upon a note and mortgage, executed by James and Mary Blue to G. W. Burton, and by him assigned to said Willard. Mary Broquet, wife of Ernest Broquet, and the other defendants, were the heirs of said James Blue. No defense was made by any of the defendants except Ernest Broquet, against whom it was averred that he had, by regular proceedings, acquired a tax deed to the mortgaged premises under a sale for delinquent taxes; that by virtue of such deed he claimed title to the land adversely to the mortgagee; that at the time of the execution of the deed he was the husband of Mary Broquet, heir of the mortgagor, and therefore under obligation to pay taxes on the land, and incompetent to acquire title thereto at tax sale. Broquet demurred to the petition. The demurrer was overruled, and judgment rendered for plaintiff, foreclosing the mortgage, and canceling the tax deed. Defendant Ernest Broquet prosecuted a writ of error.

John R. Hamilton, for the plaintiff in error.

C. D. Jones, for the defendant in error.

CLOSTON, C. The single question now presented is, Could the plaintiff in error obtain a valid tax title upon land in which his wife had an interest as one of the surviving heirs of James Blue, her father? It is to be remembered that this action was to foreclose a mortgage that was executed in the lifetime of James Blue. After his death, the plaintiff in error obtained a tax title upon the property mortgaged, in which his wife was an heir, and the plaintiff in error now insists that the question of the validity of this tax title could not be litigated in this action. This question has been decided in this court, and against the plaintiff in error, in *Bradley v. Parkhurst*, 20 Kan. 462, where it is held that all outstanding tax liens might be brought in and determined in an action to foreclose a mortgage.

The remaining questions are, Was the tax title void because issued to the plaintiff in error? and had he, by reason of being the husband of an heir at law of James Blue, such an interest in the property as to render the tax title void? The record is silent on the question of possession or claim of homestead interest by plaintiff in error, and in the absence of any claim of that kind, we must presume that no possession vested in him; and if no possession vested in Ernest Broquet, then can it be said that he was under any legal obligation to pay the taxes upon the premises? It has been universally held that where a husband and wife had an interest in common with other heirs, that neither could obtain a tax title upon the property. This is based upon the assumption that, being in the possession and enjoyment of the premises, an obligation rested upon them to pay the taxes: *Burns v. Bryne*, 45 Iowa, 285; *Austin v. Barrett*, 44 Iowa, 488; *Busch v. Huston*, 75 Ill. 343. But where these facts do not exist, we think they are freed from this obligation, and the husband might procure a valid tax title upon the property, although his wife may have an interest in the property.

It is recommended that the judgment of the court below be reversed, and the cause remanded, with directions to sustain the demurrer of the defendant to the plaintiff's petition.

By the COURT. It is so ordered.

TAX SALES. — AS TO WHO MAY ACQUIRE TITLE by purchasing land at a tax sale, see extended note to *Blake v. Howe*, 1 Aiken, 306; 15 Am. Dec. 684-690; *Laton v. Balcom*, 64 N. H. 92; 10 Am. St. Rep. 381, and note.

DREILLING v. FIRST NATIONAL BANK.

[43 KANSAS, 197.]

PRACTICE — Where an original petition is answered by a general denial, and by setting up other matters in defense, and is replied to by a general denial, a second answer not setting forth any new matter need not be replied to.

NEGOTIABLE INSTRUMENTS—SUIT ON NOTE—ORDER OF PROOF. — In an action by the assignee of a note given in payment of a thrashing-machine, warranted by the seller, after the plaintiff has testified that he purchased the note before due, and without knowledge of any equities, the court may require the defendant, before offering evidence of a breach of the warranty and failure of consideration, to show that the note was either transferred after maturity, or without a valuable consideration, or taken with notice of defendant's equities.

NEGOTIABLE INSTRUMENTS—INNOCENT PURCHASER FOR VALUE. — If a bank discounts a note before due and places the amount to the credit of the payee, this alone will not constitute the bank a *bona fide* purchaser for value against equities; but if the payee subsequently checks against and exhausts the amount of his credit at the time the note was placed to his account, including the amount of the note, before the bank has notice of any equities, it will be considered an innocent purchaser for value.

H. D. Gilkeson, for the plaintiffs in error.

Reeder and Reeder, and W. P. Montgomery, for the defendant in error.

HOLT, C. This was an action in the Ellis district court on a negotiable promissory note; trial by jury; the court directed them peremptorily to find for the plaintiff for the unpaid balance of the note. The defendants, as plaintiffs in error, complain of this direction of the court, and of certain rulings concerning the pleadings.

The action was commenced by the First National Bank of Battle Creek as plaintiff. Afterward the court permitted a supplemental petition to be filed, wherein none of the allegations of the original petition were repeated upon which the plaintiff relied to recover, but simply stated that after the commencement of this action the First National Bank of Battle Creek and the Second National Bank of Battle Creek had been consolidated, under the name of the National Bank of Battle Creek. This supplemental pleading was authorized by section 144, Civil Code: *Clark v. Spencer*, 14 Kan. 398; 19 Am. Rep. 96; *Simpson v. Voss*, 31 Kan. 227.

The defendants answered the original petition by a sworn denial, and also by setting up other matters of defense; the plaintiff replied by a general denial. After the supplemental

petition was filed, the defendants again answered fully as to the merits of the action, but set up no new matter, only more elaborately and fully stating their defenses as set forth in their first answer. After this second answer, there was no reply filed. None was necessary; the allegations of the answer had been once denied substantially by the reply to the defendant's original answer; this was sufficient: *Brookover v. Esterly*, 12 Kan. 149; *Cooper v. Davis S. M. Co.*, 37 Kan. 231.

At the trial the plaintiff showed that it bought the note before due, without knowledge of any defenses there might be to it. The note was given in payment of a thrashing-machine. In the sale of this machine a warranty was given, and the defense urged was, that there had been a breach of the warranty, and therefore a failure of consideration. The court required of the defendants, before proof of this warranty and its breach could be offered, that they should show that the note was either transferred after due, or else was not transferred for a valuable consideration, or that if plaintiff took it before due, he took it with notice of the defenses which defendants had against it. The defendants proffered evidence to show the warranty and its breach, but neither offered nor attempted to establish either one of the three propositions suggested by the court. The defendants complain of this ruling, first, because the court arbitrarily directed their order of proof. It had the right to do so, and did not abuse its discretion in its requirements; in fact, it was the proper order for the court to make.

Ordinarily, a party has latitude in introducing his testimony; but in this case it would have been an idle thing to introduce testimony concerning the warranty and its breach, when it had been fairly established by evidence, *prima facie*, that plaintiff was a *bona fide* purchaser of the note before maturity. All defenses which might have been urged against the original payee thereof were cut off in an action by the holder, who purchased before maturity, without notice, and for a valuable consideration.

The defendants urge, secondly, that the evidence offered by the plaintiff does not show it to have been a *bona fide* purchaser of the note. The testimony established that the First National Bank of Battle Creek took this note at its face value before due, and gave Nichols, Shepherd, & Co., the original payees of the note, credit on their account. When the note was taken, Nichols, Shepherd, & Co. had a balance at the bank to their

credit of over ten thousand dollars, and it was proven that up to the time of this action their balance had never been less than ten thousand dollars. The testimony of Victor P. Collins, president of the bank, shows that the amount of the credit of Nichols, Shepherd, & Co. at the bank when this note was placed to their credit has since been drawn out many times and replaced by new deposits, so that the amount to the credit of Nichols, Shepherd, & Co., though often changed in character, had not been materially diminished in amount, but had been kept good by other notes, drafts, and moneys deposited subsequently. It is probably true that simply discounting a note and crediting the amount thereof on the indorser's account without parting with any value for it is not enough to constitute such bank a *bona fide* purchaser of the note; in this instance, however, this transaction was simply placing the note to the credit of Nichols, Shepherd, & Co. alone, for they subsequently checked against it and exhausted the amount of their credit at the time this note was placed to their account, including the amount of this note.

We think the fact of thus paying out the full amount makes them purchasers. It is conceded that the bank did not buy the note outright and pay for it at that time, but it certainly was debtor to Nichols, Shepherd, & Co. for its amount; and the general rule as to the application of payments, when there are no special facts to interfere, is, that the first payments go to the oldest debts. Under this rule, the bank paid for it by allowing Nichols, Shepherd, & Co. to check against and exhaust the amount of their credit at that time. This note was a part of that credit; it paid for it by cashing checks drawn upon it, and thus became a purchaser of the same for value: *Fox v. Bank of Kansas City*, 30 Kan. 441; *Mann v. Second National Bank*, 30 Kan. 412; Randolph on Commercial Paper, sec. 994.

The other errors complained of do not require mention; and we recommend that the judgment be affirmed.

By the COURT. It is so ordered.

PROMISSORY NOTES — PRESUMPTIONS IN FAVOR OF BONA FIDE HOLDER. — The holder of negotiable paper is presumed to be a *bona fide* holder, until something is shown to the disparagement of his title: *Davis v. Bartlett*, 12 Ohio St. 534; 30 Am. Dec. 375, and note. Where one takes a negotiable note before maturity, without notice of any defect of title, and in good faith, he holds it against the world, and the burden of proof is upon the person who assails his title: *Doll v. Rivetti*, 20 La. Ann. 263; 26 Am. Dec. 399, and note.

The law looks with favor upon the holder of negotiable paper, and requires very cogent proof to convict him of bad faith: *New Orleans etc. Banking Co. v. Templeton*, 20 La. Ann. 141; 96 Am. Dec. 385. The burden of showing bad faith is upon him who alleges it: *Woodworth v. Huntoon*, 40 Ill. 131; 89 Am. Dec. 340. But see *Williams v. Huntington*, 68 Md. 599, 6 Am. St. Rep. 477, for the rule as to when the burden of proof is cast upon the holder to show good faith.

BANKS AND BANKING — DISCOUNTING NOTE. — Where a bank discounted a note, and placed the proceeds to the credit of the borrower, subsequently discovering that the maker was insolvent, it properly tendered back the note and refused to pay the proceeds to the borrower's assignee: *Dougherty v. Central Nat. Bank*, 93 Pa. St. 227; 39 Am. Rep. 750.

ATCHISON, TOPEKA, AND SANTA FE RAILROAD COMPANY v. COCHRAN.

[43 KANSAS, :25.]

RAILROADS — STOCKHOLDER'S LIABILITY FOR NEGLIGENCE. — Stockholders in a railroad company are not individually liable for the negligence of the officers, agents, or employees of the company operating the road. The remedy is against the company, not against the stockholders.

CORPORATIONS, RIGHT OF ONE TO PURCHASE STOCK OF ANOTHER. — A railroad company may purchase and hold the stock of any other railroad company whose line of road, constructed or being constructed, connects with its own. This right exists under statute in Kansas.

RAILROADS — STOCKHOLDER'S LIABILITY FOR NEGLIGENCE OF CONNECTING ROAD. — Where the rights and powers of a railroad company in relation to a connecting road are those of a stockholder merely, the former, as such stockholder, is not liable for the negligence of the latter.

RAILROADS — CONNECTING CARRIERS — LIABILITY FOR ACT OF AGENT ACTING FOR BOTH. — When connecting carriers use one station and jointly employ a ticket-agent, the fact that he sells a ticket for transportation over one of the roads does not render the other road liable for the safe transportation of the passenger over the road on which he bought the ticket.

George R. Peck, A. A. Hurd, and Robert Dunlap, for the plaintiff in error.

A. Smith Devoney, for the defendant in error.

HORTON, C. J. This was an action brought by Joel Cochran, administrator of the estate of John M. Gibson, deceased, against the Atchison, Topeka, and Santa Fé Railroad Company, to recover damages for the killing of Mr. Gibson, at Holliday, in this state. At the time of his death Mr. Gibson was a widower with two married daughters, and no other children. He was the owner of a farm in Douglas County, which

was occupied by a tenant. One daughter resided at Eudora, and the other at Olathe. He sometimes made his home with one and at other times with the other daughter. He was about sixty-five years of age. About eight o'clock, A. M., on the twenty-first day of March, 1887, he left Eudora and took passage on a regular passenger train of the Atchison road for Holliday. The latter is a junction of the Atchison road and the Southern Kansas railway, in Johnson County. Mr. Gibson left the train at Holliday, and at once purchased a ticket at the office there over the Southern Kansas railway for Olathe. He was compelled to wait the coming of the Southern Kansas train from Kansas City, Missouri, from about 9:30, A. M., until 11:30, A. M. The Southern Kansas train pulled into Holliday, on the second track, about 11:30, A. M., and at this time there were six or seven passengers for Olathe and the southwest waiting. When the Southern Kansas came up, some of the passengers were on the south side of the platform, next to the first or main track; among them were Mr. Gibson, the deceased, Johnson and Owens. Just as the Southern Kansas train had come to a rest, one passenger crossed the first track, and the mail-carrier crossed and got over, and he was followed by Mr. Gibson. As he got upon the track, a freight train of the Atchison road came in from the west, in front of the platform and on the main track; the engine struck Mr. Gibson, knocked him down, and dragged him some distance between the north rail and the platform. His head was badly cut, his leg was broken in two places, and he was greatly bruised about the body, internally and externally. His daughter, Mrs. Cochran, came to Holliday, took him to her house at Olathe, where he died, intestate, on the thirtieth day of March, 1887.

It is clearly apparent from the instructions of the court and the findings of the jury that the recovery for the plaintiff below against the railroad company was upon the theory that Mr. Gibson, at the time of his injury, was entitled to the rights and privileges of a passenger of the Atchison company. This upon the claim that the Atchison company controlled, directed, and managed the Southern Kansas railway. The testimony in the record will not sustain a verdict upon this ground. The ticket which Gibson purchased at the station read: "Southern Kansas Rly. Co. First-class ticket. Holliday to Olathe. (When stamped by agent at first-named station.) S. B. Hynes, G. P. A. (2882.) [Reverse side; stamped] A. T.

& S. F. R. R. Co., Holliday, Mar. 21st, 1887. Ex. I, A. P. R." At the station of Holliday, the second track south of the depot was used by the Southern Kansas Railway Company for its passenger trains, and the main track next to the depot, and south thereof, was used by the Atchison, Topeka, and Santa Fé Railroad Company. The jury found that the majority of the stock of the Southern Kansas Railway Company was owned by the Kansas City, Topeka, and Western Railroad Company; that the balance of the stock of the company was owned by the Atchison company; and that the Atchison company leased and operated the Kansas City, Topeka, and Western railroad. The two companies, according to the testimony, are separate and independent corporations. The Atchison company, by virtue of controlling the stock of the Southern Kansas Railway Company, was enabled to elect directors of that company. These directors elected several persons who were also officials of the Atchison company.

In *Atchison etc. R. R. Co. v. Davis*, 34 Kan. 209, 210, it is said: "That corporation had the power to purchase and hold the stock and bonds of the Wichita and Western Railroad Company, or to guarantee the payment of the principal and interest of the bonds of that company, and thereby, as a stockholder or bondholder, or as a guarantor of the bonds, to aid that company to construct its road; but by so doing, the Santa Fé company did not make the Wichita and Western company its servant or agent, and did not thereby make itself responsible for the negligence or other default of the Wichita and Western company: Laws of 1873, c. 105; Const., art. 12, sec. 2; Comp. Laws of 1879, c. 23, sec. 32. . . . Where a parent company, operating a long line of road in the state, takes the necessary steps to construct an auxiliary railroad for the purpose of a local line, in the name of another company, and in strictly pursuing the provisions of the statute merely furnished aid as a stockholder or bondholder, or a guarantor of bonds, to the auxiliary company, and such auxiliary company constructs its road in its own name, it is not the servant or agent, in such construction, of the parent company; and the parent company is not, on account of being a stockholder or bondholder, or guarantor of bonds of the auxiliary company, responsible for the negligence or other default of the auxiliary company in constructing its road in its own name."

In the case of *Pullman Pal. Car Co. v. Missouri Pac. R'y Co.*, 115 U. S. 587, the former company claimed that the St. Louis,

Iron Mountain, and Southern Railway Company was controlled by the Missouri Pacific company, and therefore that the Missouri Pacific company was bound, under its contract, to haul the palace cars over it. In that case, as in this, it was shown that the Missouri Pacific company owned stock in the railway company, and in that way selected its directors. The court, however, decided that this did not give it the control of the road. Chief Justice Waite, in delivering the opinion of the court, said, among other things, that "the Missouri Pacific company has bought the stock of the St. Louis, Iron Mountain, and Southern company, and has effected a satisfactory election of directors; but this is all. It has all the advantages of a control of the road, but that is not in law the control itself. Practically it may control the company, but the company alone controls its road. In a sense, the stockholders of a corporation own its property, but they are not the managers of its business, or in the immediate control of its affairs. Ordinarily they elect the governing body of the corporation, and that body controls its property. Such is the case here. The Missouri Pacific company owns enough of the stock of the St. Louis, Iron Mountain, and Southern to control the election of directors, and this it has done. The directors now control the road though their own agents and executive officers, and these agents and officers are in no way under the direction of the Missouri Pacific company. If they or the directors act contrary to the wishes of the Missouri Pacific company, that company has no power to prevent it, except by the election, at the proper time and in the proper way, of other directors, or by some judicial proceeding for the protection of its interest as a stockholder. Its rights and its powers are those of the stockholder only. It is not the corporation, in the sense of that term as applied to the management of the corporate business or the control of the corporate property."

There is no testimony in the record tending to show that the Atchison road leased the Southern Kansas road, or that it was the owner of the road. The rights and powers of the Atchison road were those of a stockholder only; therefore the Atchison road was not the Southern Kansas corporation in the sense of that term as applied to the management of the corporate business, or the control of the corporate property of the Southern Kansas.

Under the laws of this state, a railroad company has a lawful right to purchase and hold stock of any other railroad

company, the line of whose railroad, constructed or being constructed, connects with its own: *Atchison etc. R. R. Co. v. Fletcher*, 85 Kan. 236. The stockholders of a railroad company may be said in a certain sense to control, direct, and manage the road, but an action for the negligence of the officers, agents, or employees of the railroad company must be brought against the company, not against the stockholders; therefore, as the rights and powers of the Atchison road in the Southern Kansas Railway Company were those of a stockholder only, the Atchison company is not responsible for the wrongful acts of omission or commission of the Southern Kansas road. As the rights and powers of the Atchison road in the Southern Kansas were those of a stockholder only, the instructions of the court that the jury might find, from the testimony, that the Southern Kansas Railway Company, for all practical purposes, was managed, controlled, and operated by the Atchison company, was misleading. The finding of a verdict upon this and similar instructions cannot be sustained.

The fact that Mr. Gibson purchased a ticket to ride over the Southern Kansas road, at the station of the Atchison road at Holliday, did not make him a passenger of the Atchison road, or make the Atchison road responsible for the negligence of the Southern Kansas road. The jury found that the person in charge of the ticket-office at the station of Holliday was agent both for the Atchison company and the Southern Kansas company; but even if the ticket-agent at Holliday acted for the Atchison road, and the Atchison road sold the ticket for the Southern Kansas road, this would not make the Atchison road liable for the negligence of the Southern Kansas. The ticket purchased by Mr. Gibson shows that the contract of carriage was made on behalf of the Southern Kansas Railway Company.

Upon a retrial, unless different testimony is presented, the case should not go to the jury upon the theory that the Atchison company controlled, directed, and managed the Southern Kansas railway. If the Southern Kansas road was guilty of negligence in not running its passenger trains close or near to the station, that company is responsible, not the Atchison. If the Atchison road operated its freight train negligently, and without any contributory negligence on his part, Mr. Gibson was killed thereby, then the Atchison company is liable, not the Southern Kansas. They were two separate corpora-

tions, and the one is not responsible for the negligence of the other.

The judgment of the district court will be reversed, and the cause remanded.

RAILROADS. — A railroad corporation cannot become a stockholder in another railroad corporation for the purpose of controlling the business or affecting the management of the latter, unless such power is conferred by statute: *Pearson v. Concord R. R. Co.*, 62 N. H. 537; 13 Am. St. Rep. 590. As to corporations, generally, acquiring stock in other corporations, see *People v. Chicago Gas Trust Co.*, 130 Ill. 268; 17 Am. St. Rep. 319, and note. One railroad corporation may acquire stock in another when the two form one continuous line of road, for under the Nebraska laws the prohibition against consolidation, etc., of railroads applies only to such roads as are parallel or competing: *State v. Atchison etc. R. R. Co.*, 24 Neb. 143; 8 Am. St. Rep. 165. In *Railway Co. v. Iron Co.*, 46 Ohio St. 44, it is decided that an incorporated company cannot subscribe to the capital stock of another, unless authorized by statute to do so.

SHERMAN CENTER TOWN COMPANY v. MORRIS.

[43 KANSAS, 282.]

CORPORATIONS — ULTRA VIRES, DEFENSE OF, WHEN NOT PERMITTED. — If a corporation has entered into a contract in violation of a directory provision of its charter, and has enjoyed the full benefit of such contract, it cannot plead in defense that it is *ultra vires*, in the absence of proof that fraud was intended or has been committed.

CORPORATIONS. — CONTRACT ULTRA VIRES, while it remains executory, cannot be enforced; but when it has been executed and the corporation has received the benefit thereof, it is estopped from denying the validity of the contract.

CORPORATIONS — RATIFICATION OF CONTRACT ULTRA VIRES. — When a corporation has had the benefit of a contract executed by its agent in disregard of a mere formality, slight evidence will establish ratification by the corporation, and estop it from denying the validity of the contract.

J. H. Sterling, for the plaintiff in error.

J. W. Lewis, for the defendant in error.

HORTON, C. J. J. R. Morris recovered a judgment against the Sherman Center Town Company for \$1,304.85, with interest and costs. This judgment is complained of by the town company. The principal grounds of defense are, that the written contract was not authorized by the board of directors of the town company, and also that it is *ultra vires*. The company is a corporation organized under the laws of the state for "the purchase of lands, the surveying and platting of town sites, selling lots and other lands." The charter also pro-

vides that "the indebtedness of the company shall not exceed five hundred dollars at any one time." The number of directors of the company was seven, and at the time of the execution of the contract D. G. Clark was the president, and Samuel J. Gandy the secretary. The contract related to the purchase of a stock of general merchandise valued at \$1,904.22. It was executed in the name of the company, signed by its president and secretary, with the seal of the company attached. Before this action was brought, the contract had been fully complied with on the part of the seller, and all the purchase price paid but \$1,304.22, the balance sued for. The case was tried before the court without a jury, and a general finding made in favor of Morris against the town company.

The rule is, that a corporation has no powers except such as are granted or necessarily implied by its charter. If we could ascertain from the testimony that the town company had not received the benefit or proceeds of the merchandise purchased by its president and secretary, we would have no hesitation in saying that the plaintiff below was not entitled to recover. It does not appear from the charter that the corporation had any authority or power to engage in buying and selling general merchandise. It appears, however, from the testimony, that at the time the contract was executed, the stock of merchandise was at Voltaire, in Sherman County. After the contract was executed and a part of the purchase-money paid, the merchandise was removed from Voltaire to Sherman Center, where the business of the town company was carried on, and where a majority of the directors of the company reside. There is testimony tending to show that the company sold the merchandise and appropriated its proceeds to its own use and benefit. The town company did not show, or offer to show, that the president and secretary of the company purchased or received the merchandise for their own use and benefit, or that they applied the proceeds to their own use and benefit. The general rule is, that where a contract executed by a corporation is *ultra vires*, and the corporation received the money or property paid upon such contract, the money or the value of the property may be recovered to prevent injury resulting from the application of *ultra vires* upon a corporate contract, if no fraud is intended or has been committed.

"After a corporation has enjoyed the benefit of a contract, or other arrangement, made in good faith with any of its

- regular agents, it is but fair that every reasonable presumption should be made in order to hold the transaction binding upon the company. Under these circumstances, the acquiescence of the share-holders may often be presumed": 2 Morawetz on Corporations, sec. 632.

While an executory contract made by a corporation without authority cannot be enforced, yet where the contract has been executed, and the corporation has received the benefit of it, the law interposes an estoppel, and will not permit the validity of the contract to be questioned: *Durham v. Carbon Coal etc. Co.*, 22 Kan. 232; *Kennedy v. Otoe County Nat. Bank*, 7 Neb. 59; *Rich v. State Nat. Bank*, 7 Neb. 201; 29 Am. Rep. 382; *Topeka Prim. Ass'n v. Martin*, 39 Kan. 750; *White v. Franklin Bank*, 39 Mass. 181; *Allegheny City v. McClurkan*, 14 Pa. St. 81. Where a contract results to the benefit of a corporation, very slight evidence of acquiescence or application will be sufficient to give it validity: *Getty v. Barnes Milling Co.*, 40 Kan. 281, 287.

We think that the limitation of five hundred dollars in the charter of the corporation cannot be regarded of any more force than by a by-law. The statute of the state provides that the charter of an ordinary private corporation shall set forth the amount of its capital stock, but does not require its indebtedness shall have other limit. Therefore, the limitation of five hundred dollars is for the direction of the officers and agents of the corporation, and may be considered directory only. It does not annul the contract.

"Where the corporation has had the benefit of an act performed by an agent in disregard of a mere formality, slight evidence will usually be sufficient to establish ratification by the share-holders, or an estoppel by reason of laches": 2 Morawetz on Corporations, sec. 634; Angell and Ames on Corporations, sec. 264; *Bates v. Bank of Alabama*, 2 Ala. 462; *Bond v. Central Bank of Georgia*, 2 Ga. 92.

The other alleged errors are not sufficiently material or important to comment upon.

The judgment of the district court will be affirmed.

CORPORATIONS — ULTRA VIRES. — As to when a corporation cannot avail itself of the defense of *ultra vires*, see *State Board v. Street R'y Co.*, 47 Ind. 407; 17 Am. Rep. 702; *Day v. Spiral Springs B. Co.*, 57 Mich. 146; 58 Am. Rep. 352; *Miners' Ditch Co. v. Zellerbach*, 37 Cal. 543; 99 Am. Dec. 300; *Underwood v. Newport Lyceum*, 5 B. Mon. 129; 41 Am. Dec. 260; *Wright v. Pipe Line Co.*, 101 Pa. St. 204; 47 Am. Rep. 701; *Denver F. Ins. Co. v. McClellan*, 9 Col. 11; 59 Am. Rep. 134.

SHERMAN CENTER TOWN COMPANY v. SWIGART.

[48 KANSAS, 292.]

CORPORATIONS—PRESUMPTION THAT OFFICERS HAD POWER TO CONTRACT.

— A contract in due form, and regular upon its face, executed by the president and secretary of a corporation, who are its duly constituted officers, is *prima facie* valid and executed with authority, and those who deny such authority take upon themselves the burden of establishing their claim.

CORPORATIONS—POWER OF OFFICERS TO EXECUTE CONTRACTS.—

Express authority by resolution directing the president and secretary to represent the corporation in the execution of contracts is not indispensable to the exercise of that power by these officers. Their authority may be implied from their conduct and the acquiescence of the directors.

CORPORATIONS—AUTHORITY OF OFFICERS TO EXECUTE CONTRACTS.—

When the president and secretary of a corporation act openly and publicly as its agents in executing its contracts, with the full knowledge and acquiescence of the directors, the corporation cannot escape liability on a contract so executed, of which it has received the benefit, on the mere ground that the authority was not expressly conferred by resolution entered upon the records of the corporation.

J. H. Sterling, for the plaintiff in error.

Bagley and Andrews, for the defendant in error.

JOHNSTON, J. William B. Swigart brought this action against the Sherman Center Town Company to recover damages for the breach of a contract by which the company bound itself to remove a building, with a stock of goods which was therein, from Itasca to Sherman Center, and there place the building upon lots which the company agreed to convey to Swigart, in good condition, over a cellar and foundation similar to that upon which it stood in Itasca. The cause was tried without a jury, and a general finding made by the court that Swigart was entitled to recover from the town company \$250, and upon this judgment was entered. Some argument is made that the making of the contract was not within the chartered powers of the company, but this question is not raised by the pleadings, and there is nothing in the record which discloses what the authorized purposes of the company are.

The principal contention is, that the contract was entered into without authority from the directors of the company. There is sufficient evidence, we think, to sustain the general finding, holding the company liable on the contract. It was executed in due form by the president and secretary of the

company, and being regular upon its face, and executed by the duly constituted officers of the corporation, it is *prima facie* evidence that it was executed with authority, and those who deny the authority take upon themselves the burden of establishing their claim. The company has received the benefits of the contract, and no question regarding the authority of the officers was raised until about the time this action was brought. The board of directors consisted of seven members, a majority of whom resided in Sherman Center, and were fully cognizant that the president and secretary were acting for the company, and had made this and many other similar contracts in behalf of the company. Some claim is made that no authority had been formally conferred upon them to represent the company, and that the rules governing the corporation did not warrant them in the exercise of the powers which they assumed to exercise; but there is no competent proof what the charter and by-laws of the corporation provided, nor was the record of the official proceedings of the board of directors offered in evidence. Express authority by resolution directing the president and secretary to represent the company and execute the contracts is not indispensable to the exercise of that power by these officers, as their authority may be implied from their conduct and acquiescence of the directors. The general understanding among the directors was, that the president and secretary should act for the company in making contracts and in managing the business affairs of the corporation. They acted openly and publicly as the agents of the company, with the full knowledge and acquiescence of the directors. The president of the corporation testified that there was no vote or resolution formally entered authorizing them to make contracts and manage the affairs of the corporation, and that the reason that a meeting was not called for that purpose was, that they had been advised by their attorney that that procedure was unnecessary to the exercise of such authority. While he says that no official record was made of their authority, it was understood among them that the president and secretary should do the business of the company. We think the legitimate inference to be drawn from the testimony is, that they were legally authorized to act for the company, and that it should not escape liability upon its contracts on the mere ground that the authority was not expressly conferred by resolution entered upon the records of the corporation: *Topeka Prim. Building Ass'n v. Martin*, 39

Kan. 750; *Giles v. Ortman*, 11 Kan. 59; *Durham v. Carbon Coal etc. Co.*, 22 Kan. 232.

The refusal to continue the cause is assigned as error, but a sufficient showing of diligence to obtain the testimony of the absent witness was not made, and the court certainly did not abuse its discretion in denying the application.

The other objections are not of sufficient importance to require notice. Judgment affirmed.

THE CASE OF *Bergman v. Bullitt*, 43 Kan. 709, was an action of ejectment to recover a parcel of land in the town of Wichita. Judgment having been given for the plaintiff, defendant alleged that it was erroneous and should be reversed. The plaintiff relied on title derived from the United States, through various conveyances to himself, and to support the claim, offered in evidence duly certified copies of a patent, and of other conveyances in his chain of title, on record in the office of the register of deeds.

It was contended that there was error in the admission of the copies in evidence, because of the want of sufficient proof of the loss or destruction of the originals. To this objection the court responded: "These, being copies of instruments authorized to be recorded in a public office, and which were recorded in the office of the register of deeds, were admissible in evidence upon proof that the original instruments were not in the possession and control of the party desiring to use the same. Proof that the originals were lost or destroyed was not essential to the admission of the copies; Civ. Code, sec. 372; Gen. Stat. of 1889, par. 1136; *Williams v. HM*, 16 Kan. 23; *Pfefferle v. State*, 39 Kan. 128."

The defendant claimed title under a tax deed, which was attacked on the grounds, — 1. That there was no sufficient redemption notice; 2. That the levy of taxes for which the property was sold was in excess of that allowed by law. It was conceded that no copy of such redemption notice was on file in the office of the county clerk, and for the purpose of showing that no such notice was given, a copy of a redemption notice, dated November 21, 1876, certified to by the county treasurer, reciting that certain parcels of land situated in a certain place, and sold in May, 1874, for delinquent taxes for 1873, would be conveyed on and after May 5, 1877, unless sooner redeemed, was introduced, and admitted against objection.

The parcel of land in dispute should have been included in the notice given at that time; but it did not appear in the certified copy, nor was there any publisher's affidavit attached thereto, nor any statement showing publication. A witness testified, against objection, that he had examined the files of the *Wichita Weekly Eagle*, which did the county printing during 1876, and that such certified copy was a true and correct copy of the notice as printed in the files of that paper; and that he found no other or different tax sale redemption notice published therein for that year. In relation to the admission of this evidence, the court said: "Neither the certified copy nor the testimony of this witness in relation to the same was competent evidence. To justify the admission of the certified copy of the treasurer, it is contended that, as the statute makes it his duty to give the notice, it is also his duty to keep a record of the notice and the affidavits or proof that such notice was published and posted; and being a part of the record of his office, a certified copy of the same is competent evidence under the provis-

ious of section 372 of the Civil Code. If the law required a notice and affidavit to be deposited and preserved in the office of the county treasurer, their contention would be good. The statute, however, provides that all notices and affidavits with reference to the sale of lands for taxes shall be filed by the county treasurer in the office of the county clerk: Tax Law, sec. 121. The county clerk is therefore the official custodian of all such papers and proofs, and certified copies of the same made by him are receivable in evidence. The county treasurer, however, not having the official custody of these records, is not authorized to certify, and the copy of the notice which he chanced to find in his office, and which was offered in evidence, should have been rejected. The parties, however, are not foreclosed by the absence of such record evidence in the office of the county clerk. The facts with reference to this redemption notice may be obtained from the files of the official paper and from the testimony of the publisher of the same, and they may be shown by still other competent evidence." The plaintiff offered in evidence a certified copy of the proceedings of the county commissioners for the year 1873, showing that a county levy of two per cent taxes was made for that year. This evidence was offered for the purpose of establishing the fact that the levy made for that year was excessive and illegal. The court, however, considered this evidence insufficient to overthrow the tax deed, and said that "on its face the deed is regular and valid, and it is *prima facie* evidence that all the steps and proceedings necessary to its validity were duly taken. More than that, it will always be presumed, in the absence of contrary evidence, that public officers have performed their duty as required by law. If the board of county commissioners could not in any event have legally levied two per cent for county revenue, the proof offered might be held sufficient to overcome the *prima facie* character of the deed, and the presumption mentioned, that the officers duly performed their duty."

The court then proceeded to say, in substance, that there was nothing in the record to show that the authorized officers were not empowered by law to fix the tax levy at two per cent, or that it was made for the current expenses of the year 1873, or that it did not include deficits in the county fund for preceding years. The plaintiff was attacking the validity of the tax deed on the ground that the property was sold for excessive taxes, and it therefore devolved on him to show this, and that the sale was illegal. The proof produced by him only shows a levy which, under some circumstances, would be legal, and under others illegal and excessive, and asks that such a construction be placed on the levy as will render it invalid. This the court will not do, in the absence of sufficient proof, but will rather give force to the presumption that the officers have done their duty and acted within the law.

For the reasons given, the judgment was reversed, and the case remanded for a new trial.

WASHINGTON v. HOSP.

[43 KANSAS, 324.]

TAX SALES — SUFFICIENCY OF REDEMPTION NOTICE. — Under a statute requiring that notices of the time limited to redeem land from tax sale by publication and posting must be completed four months before the expiration of the time allowed for redemption, the posting of notice, as required, four months before such time, together with proper publication, is a compliance with the statute, although the notice by publication and the notice by posting have not existed for the same length of time.

TAX DEED — PRESUMPTION OF VALIDITY. — A tax deed regular upon its face is *prima facie* evidence of the regularity of the proceedings, and that the redemption lists and notices were properly posted as required by statute. The burden of proof is on the party attacking the deed to show its invalidity.

OFFICE AND OFFICERS. — **OFFICER IS PRESUMED TO DO HIS DUTY**, in the absence of evidence to the contrary, and when the affidavit of a county treasurer, found among the records of his office, recites the time and places in his county where notice of time for redemption from a tax sale was posted, it will be presumed, in the absence of other evidence, that the officer did his duty, and posted the notice as required by statute.

N. Cree, for the plaintiffs in error.

Alden and McGrew, for the defendant in error.

JOHNSTON, J. This is a proceeding to reverse a judgment of the district court of Wyandotte County, awarded in an action of ejectment, wherein Leander Hosp sought a recovery of real estate from George and Alice Washington, and prevailed. Hosp held under a tax deed regular upon its face, and the only attack made upon his title, or the tax proceedings on which it was founded, was, that the redemption notice given was insufficient. According to the notice, the time limited for redeeming the land in controversy was September 5, 1885; and under the statute requiring notice to be given and completed four months before the expiration of the time of redemption, publication and posting of the notices must have been completed on May 5, 1885. The statutory provision which governs the giving of such notices, or so much of it as is necessary to quote, reads: "The county treasurer, at least four months before the expiration of the time limited for redeeming lands as aforesaid, shall cause to be published in some paper published in, or of general circulation in, his county, once a week for four consecutive weeks (the publication herein provided for to be completed four months before the day of sale), a list of all unredeemed land. . . . He

shall also cause to be posted for the same length of time such list and notice in at least four public places in the county, one of which shall be in some conspicuous place in his office": Comp. Laws of 1885, c. 107, sec. 137.

The publication in the newspaper is conceded to be sufficient, and the notices were all posted prior to May 5, 1885; but three of them were not posted until May 2, 1885, and it is now claimed that all should have been posted four weeks preceding May 5, 1885. The contention is, that the posting must correspond with the publication, and that the four months' notice of redemption cannot be given by posting, unless the notices are posted four months and four weeks before the expiration of the time to redeem. This construction does not accord with our view. The provision requiring a posting "for the same length of time" refers to the period of four months which must intervene between the completion of notice and the time of redemption. The theory of the statute is, that notice by both methods shall be given and completed at least four months before the time limited to redeem. The notice by publication is complete when it has been published in a newspaper of general circulation once a week for four consecutive weeks. The notice by posting is complete when lists and notices have been posted in four public places in the county, one of which shall be in some conspicuous place in the office of the county treasurer. It may be granted that the posting is as essential as the publication, and that the notice in each case must be "for the same length of time"; that is, both of the notices in the present case must have been completed on May 5, 1885. This was done, and we think the requirements of the statute were complied with.

Another objection to the notices is, that the proof offered did not show that they were posted in public places, nor that one of them was posted in a conspicuous place in the county treasurer's office. The tax deed under which Hosp claimed, and which he offered in evidence, being regular upon its face, was *prima facie* evidence of the regularity of the proceedings, and that the redemption lists and notices were properly posted up. Having established his case, it devolved upon the Washingtons to prove that the notices were not posted as the law required. The only proof offered by them to sustain their claim was the affidavit of the county treasurer, found in the record of the county, in which, among other things, he recited the time and places in his county where the notices were

posted, and also stated that one of them was posted in his office. No testimony was offered to show that the places where the notices were posted were not public places, nor that the one posted in the office was not in a conspicuous place. More than that, the presumption of law, in the absence of testimony, is, that the officer does his duty; and in this case we must assume from the state of the record that the county treasurer did that which was required of him. There was no proof offered to overthrow the *prima facie* case established by the defendant in error: *Stout v. Coates*, 35 Kan. 382.

The judgment of the district court must be affirmed.

PRESUMPTIONS — OFFICER. — The presumption is, that an officer does his duty, but this presumption may be rebutted: *Dubuc v. Voss*, 19 La. Ann. 210; 92 Am. Dec. 526; *Farr v. Sims*, Rich. Eq. Cas. 122; 24 Am. Dec. 396. This presumption will be indulged in to support judicial sales: *Terry v. Bleight*, 3 T. B. Mon. 270; 16 Am. Dec. 101. And when the record is silent as to whether a constable gave due notice of a sale, the presumption exists: *Culbertson v. Milhollin*, 22 Ind. 362; 85 Am. Dec. 428. Compare *National Bank v. Herold*, 74 Cal. 603; 5 Am. St. Rep. 476. The regularity of all proceedings leading up to a sheriff's sale will be presumed, in the absence of proof to the contrary: *Leger v. Doyle*, 11 Rich. 109; 70 Am. Dec. 240. Compare *Blodgett v. Perry*, 97 Mo. 263; 10 Am. St. Rep. 307, and note; *Greer v. Wintersmith*, 85 Ky. 516; 7 Am. St. Rep. 613, and note.

TAX DEED. — RECITALS IN A TAX DEED as to compliance with statutory requirements are not even *prima facie* evidence of such compliance: *Brown v. Wright*, 17 Vt. 97; 42 Am. Dec. 481; *Jackson v. Shepard*, 7 Cow. 88; 17 Am. Dec. 502, and note 505-514.

MISSOURI PACIFIC RAILWAY Co. v. SHARITT.

[48 KANSAS, 374.]

GARNISHMENT — EXEMPTIONS. — A RESIDENT OF ONE state who performs labor in such state for a railway company having its residence in another state, but doing business in both states, in each of which wages are exempt, may maintain an action to recover his wages in the state of his residence, although, prior to the commencement of such action, garnishment proceedings against such company, instituted by the creditor of such employee, were pending in the other state, and he has been served with summons by publication.

ACTION by J. W. Sharitt against the Missouri Pacific Railway Company to recover wages due. The defendant company, a Missouri corporation doing business there, in Kansas, and in other states, owed a debt to plaintiff, a resident of Kansas, for wages earned by him as yard-master for the defendant company, in the latter state, where such wages are exempt

from attachment and execution. W. P. Stewart, a resident of Missouri, and a creditor of Sharitt's, instituted a garnishment proceeding against the defendant company in that state to procure payment of the debt out of the money which the defendant owed plaintiff. Plaintiff was served with summons in that action by publication, and it was still pending at the time of the institution of the present suit. Judgment for plaintiff. The defendant company prosecuted a writ of error.

John W. Deford, and Waggener, Martin, and Orr, for the plaintiff in error.

Enoch Harpole, for the defendant in error.

CLOGSTON, C. It is not contended that the claim sued on is not exempt under the exemption laws of this state, but it is contended that because the garnishment proceedings were commenced in Missouri, and the court of that state obtained jurisdiction of the subject-matter before this suit was brought in Kansas, for that reason the defendant company became liable under its answer in Missouri under said proceedings, and should not again be held liable in this state, in this action. The plaintiff in error recognizes the rule laid down by this court, that if the garnishment proceedings had been commenced in this state, no question could have been raised, and also recognizes the rule adopted in this state, that the garnishee has the same right in his answer to raise all the questions that the debtor himself might raise, and plead the exemption law as completely as the debtor might plead it. But plaintiff in error says no such rule exists in Missouri; that under the decisions of that state it is precluded from asserting this right, and therefore if it is compelled to pay this judgment, it will again have to pay the claim under its answer in Missouri. This seems to present a hardship; but as the claim is exempt under the laws of this state, and presumably exempt under the laws of Missouri,—for it is presumed, in the absence of any showing to the contrary, that the laws of Missouri are the same as the statutes of this state,—therefore, if this claim is exempt under both the laws of Missouri and of Kansas, it would be unjust to the defendant in error if, by reason of some construction of the statute of Missouri, he should be prevented from securing the benefit of the exemption. It has been held in this state that the garnishee may plead the exemption laws, and be protected thereby as completely as the debtor would be: *Mull v. Jones*, 33 Kan. 112. This seems to be the well-

recognized doctrine elsewhere; and while there is some conflict in the authorities on this subject, the great weight of authority is with our court.

We see no reason why an exception should be made in this case to a rule so well established. Under the rule laid down in *Missouri Pac. R'y Co. v. Maltby*, 34 Kan. 131, and *Kansas etc. R. R. Co. v. Gough*, 35 Kan. 1, this judgment must be affirmed; see also *Drake v. Lake Shore etc. R'y Co.*, 69 Mich. 168; 13 Am. St. Rep. 382. Under those decisions, this claim would be exempt to the plaintiff below had he resided either in the state of Missouri, or, as he does, in Kansas, and such exemption ought to be a good defense for the defendant company in Missouri.

It is therefore recommended that the judgment of the court below be affirmed.

By the COURT. It is so ordered.

VALENTINE, J., gave as his reasons for concurring in the judgment, that it was generally maintained that the laws of the country where a debt is created enter into the contract upon which the debt is founded, so far as applicable and material, and form a part thereof: *Greer v. McCarter*, 5 Kan. 17-22; *Deering v. Boyte*, 8 Kan. 525-532; and in the absence of proof to the contrary, it will be presumed that the laws of all other states are the same as those in which the case is pending: *Furrow v. Clupis*, 13 Kan. 107; *Dodds v. Coffin*, 15 Kan. 277-285, and cases cited; *Kansas Pacific R'y Co. v. Cutter*, 16 Kan. 568; *Baughman v. Baughman*, 29 Kan. 283. When the *situs* of a debt is changed from the state or jurisdiction in which such debt was created to some other state or jurisdiction, all of the incidents and conditions materially affecting it are transferred with it; and its interpretation, scope, and validity will be governed by the *lex loci contractus*. Thus if the debt is exempt from judicial process in the state of its creation, the exemption will follow it, as an incident, into any other state or jurisdiction into which it may be supposed to be carried: *Drake v. Lake Shore etc. R'y Co.*, 69 Mich. 168; *Wright v. Chicago etc. R. R. Co.*, 19 Neb. 175; *Baylies v. Houghton*, 15 Vt. 628; *Pierce v. Chicago etc. R'y Co.*, 36 Wis. 283; *Missouri Pacific R'y Co. v. Maltby*, 34 Kan. 125-128. The *situs* of the debt is either with the owner thereof or at his domicile, or where it is to be paid, and cannot be subjected to garnishment elsewhere.

In speaking of the debt in dispute, the judge said: "The debt is really and in fact a mere chose in action resting wholly in *parol*, and is of such an intangible character that it could not be actually seized by any kind of process. And it can hardly be said to have any actual *situs* anywhere; but if it should be considered as having any actual *situs* anywhere, then its more natural *situs* is where it is to be paid, in Kansas and to Sharitt. It is seldom, and perhaps never, held that the property in a debt, a mere chose in action, can be carried around with the debtor wherever he may go, and exist wherever he may be: *Drake on Attachment*, sec. 474, 481; *Wade on Attachment*, sec. 244; *Wheat v. Platte City etc. R. R. Co.*, 4 Kan. 370. But, on the contrary, the *situs* of a debt is generally held to be with the creditor or at

his domicile, or at the place where it is made payable. It is the creditor that owns the debt, and not the debtor; and the *situs* of the debt must be considered as being either with the owner or at his domicile, or where it is to be paid. Indeed, the more natural *situs* of any contract, whether a debt or not, would seem to be where it is to be performed. Even tangible property is not subject to garnishment proceedings in a state or jurisdiction in which the property is not situated: See the above authorities, and also *Bates v. Chicago etc. R'y Co.*, 60 Wis. 296, 304, 305; see also *Sutherland v. Second National Bank*, 78 Ky. 250. Now, under the facts of this case, we do not think that the Missouri court has any jurisdiction either of Sharitt or of anything belonging or appertaining to him, and hence the garnishment proceeding is void as to him. We think the weight of authority sustains this view of the case: *Louisville etc. R. R. Co. v. Dooley*, 78 Ala. 524; *Miller v. Hooe*, 2 Cranch C. C. 622; *Baylies v. Houghton*, 15 Vt. 626; *Towle v. Wilder*, 57 Vt. 622; *Willet v. Equitable Ins. Co.*, 10 Abb. Pr. 193; *Noble v. Thompson Oil Co.*, 79 Pa. St. 354; 21 Am. Rep. 66; *Williams v. Ingersoll*, 89 N. Y. 509-523; *Green's Bank v. Wickham*, 23 Mo. App. 663; *Fidler v. Jessup*, 24 Mo. App. 91; *Kenting v. American etc. Co.*, 32 Mo. App. 293; *Todd v. Missouri Pacific R'y Co.*, 33 Mo. App. 110; *Bates v. N. O. J. & G. N. R'y Co.*, 4 Abb. Pr. 72; *Lovejoy v. Albee*, 33 Mo. 414; *Lawrence v. Smith*, 45 N. H. 533; *Hamilton v. Rogers*, 67 Mich. 135; *Drake v. Lake Shore etc. R'y Co.*, 69 Mich. 168; *Wright v. Chicago etc. R. R. Co.*, 19 Neb. 175; *Pierce v. Chicago etc. R'y Co.*, 36 Wis. 383; *Tingley v. Bateman*, 10 Mass. 343; *Nye v. Liscombe*, 21 Pick. 263; *Sawyer v. Thompson*, 24 N. H. 510; *Western R. R. Co. v. Thornton*, 60 Ga. 300; *Green v. Farmers' Bank*, 25 Conn. 452; *Cronin v. Foster*, 13 R. I. 196; *Myer v. Liverpool, L., & G. Ins. Co.*, 40 Md. 595; *Wheat v. Platte City etc. R. R. Co.*, 4 Kan. 370.

Judge Valentine placed his concurrence chiefly upon the theory that the Missouri court had no jurisdiction over Sharitt, or of anything belonging to him, and that there was no such thing as a *lis pendens* by virtue of the proceeding in that state in regard to the subject-matter of this action, and nothing in the proceeding in that state was valid or binding against him.

The court first obtaining jurisdiction of the subject-matter of an action has the superior right to control such subject-matter. The Missouri court had jurisdiction of Stewart, the plaintiff in that case, and of the railroad company, the garnishee therein; and any judgment or order which might be rendered or made by that court as against them would be binding on them; and if Stewart had obtained personal service of summons in that state upon Sharitt, then any judgment or order which might be rendered by that court against him, or against the garnishee, would be binding on both. Even without personal service on Sharitt, if he had any tangible property in that state which that court could seize, even money in the hands of some one, any judgment or order which that court might make after such seizure would be binding against Sharitt; or if it could be considered that the debt owing him had a *situs* in that state, then he would be bound by a judgment of that court; or if he were a resident of that state, or even temporarily there at the time of the attempted seizure of the debt, or if the debt were made payable in that state, it might then have such a *situs* as to subject it, to the jurisdiction of that court. None of these things existing in this case, the court in that state had no jurisdiction of Sharitt, or of anything belonging to him.

The laws of a state have no extraterritorial force. Hence if exempt property, such as could be seized under process, were carried into another state, such property might cease to be exempt, and therefore be lawfully seized by

attachment or garnishment for the payments of debts; but debts existing in Kansas are not at the same time situate in Missouri.

Generally, contracts with respect to everything of substance inhering in them, including the laws of the country where such contracts are made, so far as they affect them, are governed and determined by the *lex loci contractus*, in whatever jurisdiction the construction or character of such contracts comes under consideration.

The following cases are cited as holding contrary views to those above expressed: *Ferguson v. Bank of Kansas City*, 25 Kan. 333; *Burlington etc. R. R. Co. v. Thompson*, 31 Kan. 180; 47 Am. Rep. 497; *Zimmerman v. Franke*, 34 Kan. 650; *Stark v. Bare*, 39 Kan. 100; 7 Am. St. Rep. 537; *Daniels v. Clark*, 38 Iowa, 556; *Moore v. Chicago etc. R. R. Co.*, 43 Iowa, 385; *Leiber v. Union Pacific R. R. Co.*, 49 Iowa, 688; *Mooney v. Union Pacific R. R. Co.*, 60 Iowa, 346; *Green v. Van Burskirk*, 7 Wall. 139; *Connor v. Hanover Ins. Co.*, 28 Fed. Rep. 519; *Morgan v. Nevill*, 74 Pa. St. 53; *Osborne v. Schutt*, 67 Mo. 712; *Blake v. Williams*, 6 Pick. 285; 17 Am. Dec. 372; *Sturtevant v. Robinson*, 18 Pick. 175; *Baltimore etc. R. R. Co. v. May*, 25 Ohio St. 347; *Snook v. Snetver*, 25 Ohio St. 516; *East Tennessee etc. R. R. Co. v. Kennedy*, 83 Ala. 462; 3 Am. St. Rep. 755.

Judge Valentine reviewed these cases, showing that in all of them jurisdiction was conceded, admitted, obtained by personal service, or else the cases themselves have no application to the case in hand, because different questions were presented. In this connection he said: "Scarcely any of the above cases have any application to the question whether a court of one state, by virtue of a garnishment proceeding against a resident garnishee, but against a non-resident and absent defendant residing in another state and owning a debt created and payable to him in his own state, and by virtue of a service of summons upon the defendant only by publication, could obtain sufficient jurisdiction over the non-resident and absent defendant, or over the debt created and payable to him in the state of his residence, that such court could render a judgment or make an order against the garnishee that would be valid and binding as against the defendant."

The argument against holding the railroad company liable in the present case, because by such holding and by the possible judgment of the Missouri court, the company might be compelled to pay the debt twice, is answered by saying that the company is not the only party entitled to sympathy. The owner of the debt and his family are entitled to greater consideration. The debt, being his personal earnings for personal services rendered for less than one month preceding the issuance of the garnishment process, is necessary for the support of his family, and by the laws of his own state is exempt from the payment of his debts and from all judicial process. Therefore it ought not to be allowed to be taken from him and his family by a foreign jurisdiction, perhaps a thousand miles away, and possibly upon a fictitious charge, without any personal service of summons upon him. He is entitled to his day in the court that has first rightfully obtained jurisdiction of him or of his debt. Notice given him by the garnishee of the pendency of the action could not confer jurisdiction on the foreign court, if it did not have jurisdiction prior to such notice. The owner of such debt upon such notice ought not to be compelled to go a thousand miles to defend the action, and thereby spend more money than the amount of his debt. It would be better for him and his family to lose the debt entirely, and let the laws of his state setting it apart for the use of himself and family become nugatory and inoperative.

"If the rule contended for by the railroad company should be adopted, then

it would be prudent for every creditor to continually watch his debtor, and to follow him around into every jurisdiction into which he might go, for fear that some unscrupulous person who really had no just claim might institute a garnishment proceeding and obtain the debt before the creditor could have an opportunity to prevent it."

In the principal case a motion for a rehearing was made and denied, Valentine and Johnston, JJ., concurring. Herton, C. J., dissented, however, he having expressed grave doubts whether the law was properly declared at the time when the judgment of the supreme court was rendered. He was of opinion that a rehearing should be granted, and the judgment of the trial court reversed. Among his reasons, he stated that railroads, like the one interested in this case, hire thousands of employees whose wages are liable to be garnished, and they ought not to be compelled to pay for the services of an employee twice, once to the creditor and again to the employee. If this railway company is compelled to satisfy the judgment rendered against it in Missouri, then the employee ought not to recover, and the action commenced in Kansas ought to be delayed until the final disposition of the proceeding in the other state: *Ferguson v. Bank of Kansas City*, 25 Kan. 333; *Burlington etc. R. R. Co. v. Thompson*, 31 Kan. 180; 47 Am. Rep. 497; 2 Kent's Com. 122, 123, 125; *Morgan v. Neville*, 74 Pa. St. 52; *Thompson on Exemptions*, sec. 21-23; *Connor v. Hanover Ins. Co.*, 28 Fed. Rep. 540; *Freeman on Executions*, 2d ed., sec. 209; *Pierce v. Chicago etc. R'y Co.*, 36 Wis. 283.

In Missouri it has been declared that the exemption of property from judicial process is a personal privilege of the owner, and the debtor of such owner cannot assert it for him by way of defense to a garnishment proceeding: *Osborne v. Schett*, 67 Mo. 712. Hence the railroad company could not, under this rule, have protected itself or its employee by alleging the exemption of the wages attached, and as the garnishment proceeding is still pending in that state, and the employee has notice thereof, it is manifest that the proceeding in Kansas should be delayed until the termination of the former action. Otherwise the railroad company may be subjected to a double liability.

Issue was taken with the view of the law as expressed in the concurring opinion *supra*, that as Sharitt is not a resident of Missouri, and has not received personal service of summons in the garnishment proceeding, the action in Missouri by the creditor, a resident of that state, against the railroad company, a Missouri corporation, is void as being without jurisdiction, and the garnishment proceeding no defense to the action by Sharitt in Kansas.

This doctrine is declared to be against the weight of authority as shown by *Drake on Attachment*, sec. 597; *Blake v. Williams*, 6 Pick. 285; 17 Am. Dec. 372; *Baltimore etc. R. R. Co. v. May*, 25 Ohio St. 347; *Sturtevant v. Robinson*, 18 Pick. 175; *Leiber v. Union Pacific R. R. Co.*, 49 Iowa, 688; *Mooney v. Union Pacific R. R. Co.*, 60 Iowa, 346. Chief Justice Horton further said: "The concurring opinion, it seems to me, attempts to establish a rule which ignores the fact that the proceedings in garnishment in Missouri are entitled to full faith and credit as a judgment of a sister state, and that being proceedings *in rem*, and the debt being condemned by a court having jurisdiction, the judgment cannot be contested in this state. Of course, between courts of concurrent jurisdiction, the court first acquiring jurisdiction will retain, and the other will not interfere with it. The courts of Missouri first acquired jurisdiction of the debt or money due to Sharitt, and the courts of this state ought not to interfere in that case until the cause is finally disposed of. If the rule is established as stated in the opinion, then the railroad company is twice liable

for the same debt, — once to Stewart, the creditor in Missouri, and then again to Sharritt, in this state. The company has done and is doing all it can to defeat and escape any liability in the garnishment proceeding; it has appealed from the judgment of the justice of the peace of St. Louis to the circuit court of St. Louis County, and has notified Sharritt of the pendency of the garnishment proceedings. The company is helpless. In Missouri, exemption is a personal privilege. The company cannot assert the exemption for Sharritt: *Osterne v. Schatz*, 67 Mo. 712. Sharritt can alone exercise this personal privilege. If he will assert his rights in the Missouri court, the debt or money will be declared exempt. It all lies with Sharritt. Under the circumstances, ought the company to pay twice, when the action of Sharritt will prevent any judgment against him or the railway company in Missouri? Ought the railway company to suffer a double liability because Sharritt refuses to answer in a case in which he has been served by publication, and in which he has been personally notified by the railway company? I think not. . . . I think that Sharritt, as a creditor of the railway company, could have enforced the collection of his debt in the courts of Missouri, and if he could have an action in that state, his creditor is entitled to equal facilities. It is not shown anywhere in the record that the debt was payable in the place or county where Sharritt performed his labor, and if the decision is carried to its logical results, Sharritt should have brought his action in the county where he worked, and not in another county. If his debt was created in Morris County, according to the decision, it was payable in Morris County; and therefore, according to the decision, he had no right to bring his action at Ottawa. This, however, is not the law. 'A mere debt is transitory, and may be enforced wherever the debtor or his property can be found.' If it be decided by this court, under the facts of this case, that the Missouri court has no jurisdiction, either of Sharritt or of anything belonging to him, or of any money due to him, and that, therefore, the garnishment proceeding in Missouri is void as to him, then there can be no garnishment of a person in this state owing a debt to a person residing in another state. The practice among the profession is contrary to this decision. Very often persons in this state owing debts to non-residents are garnished by the creditors of the non-residents in this state, and the only service had on the non-residents is by publication, being the same service had in the Missouri court upon Sharritt: Comp. Laws of 1885, c. 61, secs. 28-54. Section 72 of the Civil Code of this state expressly provides, the same as the Missouri code, that 'service may be made by publication in actions brought against non-residents of this state, or a foreign corporation, having in this state debts owing to them sought to be taken by any of the provisional remedies, or to be appropriated in any way.' "

Judge Horton then stated that the concurring opinion, *supra*, could not be adopted without overruling several prior decisions of the court, among them being *Barlington etc. R. R. Co. v. Thompson*, 31 Kan. 130, 47 Am. Rep. 497, *Zimmerman v. Frank*, 34 Kan. 650, and *Starke v. Bare*, 39 Kan. 100, 7 Am. St. Rep. 587, which follow *Syock v. Snetzer*, 25 Ohio St. 518; *Baltimore etc. R. R. Co. v. May*, 25 Ohio St. 247. He then declared that the cases cited in the concurring opinion, as holding adverse views to those expressed by himself, have very little application to the case in hand. After citing *Missouri Pacific R'y Co. v. Mally*, 34 Kan. 125-131, *Kansas City etc. R. R. Co. v. Gough*, 35 Kan. 1, *Bates v. Chicago etc. R. R. Co.*, 60 Wis. 296, 50 Am. Rep. 369, *Sutherland v. Second National Bank*, 78 Ky. 250, *Wheat v. Platte City etc. R. R. Co.*, 4 Kan. 370, *Wright v. Chicago etc. R. R. Co.*, 19 Neb. 176, 56 Am. Rep.

747, and showing wherein they are inapplicable to the facts presented in the principal case, he said: "I need not review these cases, because they do not meet the question presented, as to the jurisdiction of the Missouri court, under the laws of that state, over the debt of the railway company due to Sharitt. They are nearly all cases where the garnishment proceedings have been commenced and disposed of in the states where the decisions have been rendered. The decisions are constructions of garnishment laws of the states where the decisions have been rendered. The question whether proceedings in garnishment of a sister state are entitled to full faith and credit as a judgment, where the corporation or person owing the debt has been garnished in such sister state and service has been made by publication upon the debtor, is discussed in but one or two, and those cases are very different from this. I think if Sharitt had brought his action in Missouri, instead of Kansas, and the railroad company had not been garnished, he could have recovered his wages in that state; and if he could have recovered his wages by an action brought there, his claim for damages could be attached or garnished there."

GERMAN INSURANCE COMPANY v. GRAY.

[43 KANSAS, 497.]

INSURANCE — WAIVER OF CONDITIONS BY AGENT. — If a policy of insurance contains a condition of forfeiture for false representations as to encumbrances, and makes the statements of the insured, as they appear in the policy, a warranty of their truth, and the applicant gives correct answers respecting encumbrances to the general agent of the company, who fails to mention them in the policy, and procures the signature of the assured, accepts the premium and issues the policy, the insurance company will be deemed to have waived the condition and held liable on the policy in case of loss.

INSURANCE — PAROL WAIVER OF CONDITION BY GENERAL AGENT. — A policy of insurance can be modified or a condition therein waived by parol, by the general agent of the insurance company.

INSURANCE — PAROL WAIVER OF CONDITION. — An insurance company or its general agent may waive by parol a condition in the policy respecting encumbrances, although the policy provides that no agent of the company, or other person than the president or secretary, shall have authority to waive any of the terms or conditions of the policy, or make any indorsement thereon, and that all agreements by the officers named must be signed by either of them.

INSURANCE — SUFFICIENCY OF PROOFS OF LOSS. — When, after loss, proofs thereof are reduced to writing, signed and sworn to by the insured at the request of the adjuster of the insurance company, and then delivered to him, after which neither he, the company, nor any one representing it, returns such proofs or claims that they are insufficient, but on the contrary, satisfaction with them is expressed, together with a statement that the loss will soon be paid, the assured has a right to assume, until notified to the contrary, that no other or different proofs will be required, and the company is estopped from claiming that they are insufficient.

ACTION to recover, under a policy of insurance, for loss of property by fire. Judgment for the plaintiff.

George W. Barnett, and George and King, for the plaintiff in error.

McDonald and Parker, for the defendant in error.

JOHNSTON, J. The greater part of the testimony taken in the case was with reference to the extent and value of the property destroyed, and as to whether or not the fire was the result of the action of the insured. But these questions, as well as all others upon which there was a conflict of evidence, have been determined by the jury in favor of the insured. The insurance company now seeks to escape liability upon the ground that Gray failed to disclose the existence of encumbrances upon the property when he made the application for insurance, and also because he had encumbered the property after the policy was issued without the consent of the company indorsed thereon, and in violation of its provisions. The application for insurance was made on December 2, 1885, to Steinbuschel and Brother, of Wichita, who were agents of the company for that portion of the state in which the property was situated. They wrote the answers to the questions propounded to Gray, and the application contained the statement that the answers made were true. The application mentions only one mortgage, but Gray testifies that he stated his indebtedness and the encumbrances on his property to the agents fully and in detail, telling them that it would be necessary for him to mortgage and remortgage his property in the conduct of his business during the time for which the insurance was contracted. This is disputed, but the jury sustain Gray, and find that the company was fully informed in respect to the existing encumbrances. The policy was not delivered by the agents at the time the application was made, but was sent by them to Gray, at Conway Springs, Sumner County, near which place he resided. Soon after it had been so delivered, he discovered that it contained a provision that if the property should thereafter become mortgaged or encumbered, or in case a change should take place in the title, the policy should be null and void. He immediately went to the agent, called his attention to the provision prohibiting the encumbering of his property, and insisted that it must be changed. After looking at the policy, Steinbuschel said that he would waive the condition relative to encumbrances, stating

that he had authority for that purpose, and Gray, acting upon this waiver and agreement, mortgaged the property as has already been stated. The encumbrances placed on the property, however, were mostly, if not entirely, the renewal and extension of debts and mortgages existing when the contract of insurance was made. In regard to the misrepresentations in the application, we must assume that Gray gave correct answers to all questions asked. There was no concealment nor deception on his part. Steinbuschel, authorized by and acting for the company, prepared the application, and purposely omitted a fuller statement concerning encumbrances. It was the fault of Steinbuschel, or the company which he represented, and not of the insured, that the application did not contain a complete statement. Steinbuschel having authority, his act must be treated as the act of the company, and through him the company had knowledge of all the encumbrances. With this knowledge the company accepted the risk and the premium therefor, induced Gray to sign the application, which did not state the whole truth, and now, when the loss occurs, it cannot, under our decisions, insist on the breach of warranty or the untruth of the representations: *Sullivan v. Phoenix Ins. Co.*, 34 Kan. 170; *Continental Ins. Co. v. Pearce*, 39 Kan. 396; *National M. F. Ins. Co. v. Barnes*, 41 Kan. 161; *Kansas Protective Union v. Gardner*, 41 Kan. 401.

It is next contended that the giving of the subsequent mortgages by the insured avoided the policy; and in that connection it is urged that error was committed in admitting testimony of the verbal agreement modifying the terms of the policy and waiving its conditions. We think the waiver must be upheld and the point made by the company overruled. The agents who made the agreement were more than mere local or soliciting agents. They fully represented the company within a certain district; were authorized to solicit insurance, receive moneys and premiums, issue and renew policies; and the testimony is, that they appointed subagents and adjusted losses. Only a short time previous to the making of the contract in question, they adjusted a loss under another insurance policy issued by the same company to Gray, and paid him the amount of the loss. Gray had a right to assume, and we may fairly assume, that they were general agents of the company. In this state the courts have taken a liberal view with reference to the power of agents, and especially where they were representing foreign compa-

nies, which can only act through their agents, and where the agent is practically the principal in the making of contracts: *American Cent. Ins. Co. v. McLanathan*, 11 Kan. 549, and cases above cited. Being general agents empowered to make and renew contracts, they stood in this respect in the place of the company, and certainly must be held to have the power to modify the same or to waive any of the conditions in the contract which they had made. We are referred to *Burlington Ins. Co. v. Gibbons*, 43 Kan. 15, *ante*, p. 118, where the power of the agent to waive a condition was denied. In that case the agent had no authority from his company except as a soliciting agent, and it did not appear that he had any authority to issue policies, and he did not even countersign them when issued. In that case, however, it was said that "it has generally been held that where a person in procuring an insurance upon his property acts in good faith, and without any knowledge of any limitations upon the authority of the agent of the insurance company effecting the insurance, such person may assume that the agent is a general agent of the insurance company for that purpose; that he stands in the place of the company, and that the company will be bound by any terms or conditions, or any waiver of terms or conditions, that the agent may agree to while acting for the company in consummating the insurance."

If it was within the power of the company, acting through its agents, to waive a condition or change the contract, it surely might do so by a parol contract, and might even waive the provisions stated in the policy with reference to the manner of altering or waiving its terms and conditions. In *Westchester F. Ins. Co. v. Earle*, 33 Mich. 143, the court, in considering the question whether an agent of a company might change by parol the conditions of a policy wherein it was provided that it could only be done upon the consent of the company written thereon, held that the written policy might be changed by parol, and stated that "a written bargain is of no higher legal degree than a parol one. Either may vary or discharge the other, and there can be no more force in an agreement in writing not to agree by parol than in a parol agreement not to agree in writing. Every such agreement is ended by the new one which contradicts it." See also *Eclectic L. Ins. Co. v. Fahrenkrug*, 68 Ill. 463.

In the present case, as in some of the cases cited, it was stipulated in the policy that no agent of the company, or any

other person than the president or secretary, should have authority to alter or waive any of the terms or conditions of the policy, or make any indorsement thereon; and all agreements of the president or secretary must be signed by either of them. This provision, however, may be modified by the company to the same extent as any other; and whatever the company can do may be done by its general agents. *Renier v. Dwelling-House Ins. Co.*, 74 Wis. 89, was a case somewhat similar to the one we are considering. In that case the policy provided that the application should form a part of the policy and a warranty by the assured. In the application for insurance it was stated that the property insured was not encumbered; but it appeared that the property was mortgaged, and that the insured informed the agent of the company of the existence of the mortgages, and he falsely wrote the answers therein, and the application was signed at the request of the agent. In the policy issued was a provision that "no act or omission of the company, or any act of its officers or agents, shall be deemed, construed, or held to be a waiver of a full and strict compliance with the foregoing provisions of the terms and conditions of this policy, except it be a waiver or extension in express terms in writing, signed by the president or secretary of the company." It was held that the action of the agent, with knowledge of the existence of the mortgage, was binding upon the company, and a waiver of the condition of the policy against encumbrances; and this notwithstanding the limitation of authority of such agent expressed in the provision quoted on the face of the policy. Speaking of the restriction, the court said: "We must hold, however, that such attempted restriction upon the power of the company or its general officers or agents acting within the scope of their general authority, to subsequently modify the contract and bind the company in a manner contrary to such previous conditions in the policy, are ineffectual. Especially is this true in respect to a foreign insurance company whose officers are practically inaccessible to the assured"; citing *Gans v. St. Paul etc. Ins. Co.*, 48 Wis. 108; 28 Am. Rep. 535; *American Ins. Co. v. Galatin*, 48 Wis. 36; *Shafer v. Phœnix Ins. Co.*, 53 Wis. 361; *Lamberton v. Connecticut Ins. Co.*, 39 Minn. 129; *Willcuts v. Northwestern etc. Ins. Co.*, 81 Ind. 308; *Steen v. Niagara F. Ins. Co.*, 89 N. Y. 326; 42 Am. Rep. 297; *Richmond v. Niagara F. Ins. Co.*, 79 N. Y. 230; *Eastern R. R. Co. v. Relief Ins. Co.*,

105 Mass. 570; *American L. Ins. Co. v. Green*, 57 Ga. 469; *Westchester F. Ins. Co. v. Earle*, 33 Mich. 143.

The court, proceeding further, says: "Of course an insurance company, and especially a foreign insurance company, in making contracts of insurance and adjusting, settling, and paying losses, must act through its agents, if at all. To hold that in such negotiations between such general agent and the assured the latter is bound, but that in the same transaction the company, the agent's principal, cannot be bound, by reason of having incapacitated itself and them, by previous stipulations, from agreeing to anything contrary to the conditions contained in the original contract, is, under most policies, in effect to hold that there is no mutuality in such contracts, and that the powers of such general agents are limited to the obtaining of premiums, and then defeating the enforcement of the policies upon which they were paid."

It is clear that the company was not so bound but that it might modify any contract which it had made or waive any of the conditions contained therein; and this may be done through its general agents. The knowledge of Steinbuschel and Brother in this case was the knowledge of the company, and their act was its act. When Gray applied for the insurance he informed the company with reference to the encumbrances, as well as his necessity and purpose to continue them. Knowing these facts, the premium was accepted and the policy issued. Subsequent to the issuance of the policy there was an express agreement that he might renew his mortgages, as he had informed the company it would be necessary to do, and the renewal of the encumbrances did not in any material degree affect the risk which the company took. Accepting his statement, as the jury have done, we must assume that he acted in good faith with the company and its agents, and that he was induced by the agreements and action of the company to believe that he was warranted in renewing the mortgages. After receiving and retaining the premium, knowing the purpose and necessity of Gray to renew the encumbrances, and after a specific agreement waiving that condition of the policy and authorizing him to renew the encumbrances, and after remaining silent, and allowing him to proceed as though he was insured, until a loss occurs, the company will not be heard to repudiate its contract or to deny its liability. We are aware that the authorities are not uniform upon the subject of waivers in policies like this one; but forfeitures are not fa-

voiced in the law, and the view we have taken of the power of a general agent to waive the condition of a policy is more satisfactory to us, and is sufficiently supported. In addition to the authorities already cited, see the following: *Young v. Hartford F. Ins. Co.*, 45 Iowa, 377; 24 Am. Rep. 784; *King v. Council Bluffs Ins. Co.*, 72 Iowa, 810; *Morrison v. Insurance Co.*, 69 Tex. 353; 5 Am. St. Rep. 63; *McGurk v. Metropolitan L. Ins. Co.*, 56 Conn. 528; *American Ins. Co. v. Gallatin*, 48 Wis. 36; *Bartlett v. Firemen's Fund Ins. Co.*, 77 Iowa, 155; *Key v. Des Moines Ins. Co.*, 77 Iowa, 174; *Sweetser v. Odd Fellows' Mut. Aid Ass'n*, 117 Ind. 97; 2 Wood on Fire Insurance, secs. 422, 525.

It is further contended that a forfeiture occurred by reason of the failure of Gray to send proofs of loss to the company. It is shown that immediately after the fire he notified Steinbuschel and Brother of the loss, and they stated that they would at once inform the company. Within a few days an adjuster of the company, whose authority is not denied, came to Gray's place and requested him to go before an officer and make proof of loss. The proofs were reduced to writing, signed and sworn to, and delivered to the adjuster; and there is testimony to the effect that he expressed satisfaction with them, and stated that he would forward them to the company's office, and would return in a few days and settle the loss. This testimony was submitted to the jury, under the following directions: —

“There is evidence tending to show that these statements were taken by said Winne as the agent of said company, and sent to said company; and it will be a question for the jury to determine, whether such statements and proofs are such as are required by the policy, and if not, whether the plaintiff was justified under the circumstances in believing, and did believe, that the proofs were satisfactory to the agent of the company and to the company, and that no further proofs would be required; and if the jury find from the evidence that the plaintiff was justified in believing, and did believe, that the proofs furnished to said Winne were satisfactory to him and to the company, and further find that such proofs and statements were sent to the company by said Winne, and that the company made no objection thereto, and requested no further proofs to be made by the plaintiff within a reasonable time, and within the sixty days after the fire, the jury would be

justified in finding that defendant had waived the making of further proofs of loss.

"If at the time such affidavits and statements were made at the request of said Winne it was understood between said agent and said plaintiff that such statements and affidavits should not constitute the proofs required by the policy, and should not be considered as a waiver of such proofs, and that by taking such statements and affidavits said Winne should not and did not waive the making of the proofs in accordance with the provisions of the policy, then the jury would not be justified in finding that the taking of such statements and affidavits by said Winne, or that the acts and conduct of said Winne at the time of taking such statements and affidavits, constituted a waiver of the proofs required by the policy."

The testimony was sufficient to sustain the finding of the jury. Neither the adjuster nor any one representing the company returned the proofs or claimed that they were insufficient. The company recognized the loss, took all the proofs it deemed essential to an adjustment, and instead of claiming that they were insufficient, expressed satisfaction with them, and stated that the loss would soon be paid. Assuming the existence of the facts stated, we think the assured had a right to assume, until notified to the contrary, that no other or different proofs would be required.

There are some criticisms in regard to the refusal of the court to give instructions, but what has already been said in the opinion disposes of the material objections that are made. The charge of the court fairly submitted the questions involved to the jury. Finding no error, the judgment of the district court will be affirmed.

INSURANCE — ACTS OF AGENT BINDING UPON COMPANY WHEN. — Where an agent fills out an application without the knowledge of the applicant, stating that the property is not encumbered, although previously informed orally by the applicant that there was a mortgage upon it, the company is bound, even though the policy provided that it should be void for any false representations made in the application; for by issuing the policy and accepting the premium, the company waived forfeiture for a breach of condition; *Baker v. Ohio F. Ins. Co.*, 70 Mich. 199; 14 Am. St. Rep. 485, and cases cited in note. Compare *Kister v. Lebanon M. Ins. Co.*, 128 Pa. St. 553; 15 Am. St. Rep. 696; note to *Wheaton v. North British etc. Ins. Co.*, 9 Am. St. Rep. 232, 233.

PAROL WAIVER OF CONDITIONS BY GENERAL AGENTS: See *Wheaton v. North British etc. Ins. Co.*, 76 Cal. 415; 9 Am. St. Rep. 216, and particularly note 214-236; *Farnum v. Phoenix Ins. Co.*, 83 Cal. 246; 17 Am. St. Rep. 233. See *Burlington Ins. Co. v. Gibbons*, 48 Kan. 15, ante, p. 118, and note.

INSURANCE — WAIVER OF DEFECTS IN PROOFS OF LOSS. — Where a policy requires preliminary proofs of loss, and they are presented in due time, but are defective, such defects are waived by a failure to object to them within a reasonable time, or by putting a refusal to pay the loss upon some other specified ground: *Central City Ins. Co. v. Oates*, 86 Ala. 558; 11 Am. St. Rep. 67, and particularly note.

WILKINSON v. ELLIOTT.

[43 KANSAS, 590.]

AGENCY. — **WIFE MAY APPOINT HER HUSBAND HER AGENT** by power of attorney to convey her inchoate interest in his real estate.

LIS PENDENS. — If a wife, in an action for divorce and alimony, definitely describes certain real estate of her husband in her petition, and asks that it be set apart to her as permanent alimony, the doctrine of *lis pendens* applies, and a purchaser of the land *pendente lite* is bound by the judgment subsequently rendered therein. If, in such action, no specific property is pointed out, but only a general prayer for alimony, the doctrine would not apply.

LIS PENDENS. — Before the doctrine of *lis pendens* will be applied to a purchaser, the petition in the suit must be actually filed and made a permanent record, with the *bona fide* intention of proceeding with the action. The mere handing of the petition to the proper officer for indorsement, and for a temporary purpose, and the immediate withdrawal of it without the issuance of summons thereon, is not a filing so as to commence the action within the meaning of the statute.

George, King, Schwinn, and Wood, for the plaintiff in error.

John A. Murray, and C. Everest Elliott, for the defendants in error.

JOHNSTON, J. This was an action brought by Augusta L. Wilkinson against John B. Elliott and Alexander C. Wilkinson for the purpose of canceling a certain deed conveying a quarter-section of land, which purported to have been executed by Wilkinson and the plaintiff to John B. Elliott on May 25, 1883, and to quiet the title to the land in her. Some of the leading facts in the case are, that on February 19, 1883, the plaintiff and Alexander C. Wilkinson were then, and for a long time prior thereto had been, living together as husband and wife, and their family at that time consisted of six children. Some difficulty having arisen between them, they agreed to separate, and in the settlement made between them it was arranged that she should take a herd of cattle, and in turn should execute to him a power of attorney authorizing him to sell the real estate in controversy, the title to which stood in his name, and it had previously been occupied by

them as their nomestead. The power of attorney was executed on February 19, 1883, and was recorded on February 22, 1883. After the settlement was made, Mrs. Wilkinson moved from the land to a house in the same neighborhood, where she resided for a short time, and she subsequently went from there to the home of her father. On May 25th of the same year, Alexander C. Wilkinson negotiated and sold the land to John B. Elliott, and under and by virtue of the power of attorney mentioned, he conveyed her interest to the purchaser. The purchase price of the land was about two thousand two hundred dollars, which was made up in part of a mortgage upon the land of seven hundred dollars, and also of a judgment and some tax liens, which Elliott assumed. On May 21, 1883, Augusta L. Wilkinson, by her counsel, prepared a petition praying for a divorce from her husband, on the ground of gross neglect of duty, and praying also that the real estate in controversy should be granted to her by the court as permanent alimony. The petition was presented to the clerk of the district court, who placed his file-marks thereon, when it was immediately thereafter taken by counsel for plaintiff in error from the court and the possession of the officer. There was no *præcipe* for a summons filed, nor any summons issued, until May 25, 1883, and not then until after the conveyance to Elliott had been made. On the twenty-fourth day of May, and upon the application of Augusta L. Wilkinson, an order was granted by the district judge, at his chambers, restraining her husband from selling or disposing of this real estate during the pendency of the divorce proceedings. But this order was not filed in the district court until the twenty-fifth day of May, nor served until the following day, and the testimony of the defendant in error tends to show that neither the order nor the original petition which had been filed was returned to the district court until after the transfer of the real estate in controversy was made to Elliott. On May 20, 1885, a divorce was granted by the district court, and in the judgment it was decreed that the land in controversy should be given to Augusta L. Wilkinson as permanent alimony. Soon afterward she brought the present action, and the district court, after a full hearing, upon the evidence offered, made a general finding in favor of the defendants, and denied the plaintiff the relief asked for.

Two points are made against the judgment: 1. That the power of attorney executed by Mrs. Wilkinson, authorizing

the conveyance of the land, was void for the reason that she was a married woman, and was therefore incapable of thus conferring authority on her husband to convey the land in controversy; and 2. That the conveyance of the land to Elliott was made during the pendency of the action for divorce and alimony, and that under the doctrine of *lis pendens*, Elliott took the conveyance subject to any judgment that might be rendered in that action.

In regard to the first question, it has already been determined by this court that "a married woman may appoint her husband by power of attorney as her agent to convey the inchoate interest which she holds in his real estate; and an instrument duly executed by himself, and by him for her under such authority, is effectual to transfer such interest": *Munger v. Baldrige*, 41 Kan. 236; 13 Am. St. Rep. 273. It is claimed that a different rule applies where the land attempted to be conveyed is a homestead; but this question we need not determine. After the settlement between Wilkinson and his wife, and before the conveyance to Elliott, they ceased to occupy the land as a homestead. There is some controversy in regard to whether the land retained the homestead character after the possession of the same had been surrendered; but in view of the general findings of the court in favor of the defendants, we must assume that the homestead was voluntarily abandoned by them; and hence the case of *Munger v. Baldrige*, 41 Kan. 236, 13 Am. St. Rep. 273, is an applicable and controlling authority. The power of attorney was sufficient in form, and after execution was immediately placed on record. It still remains a matter of record, and there has been no attempt to revoke the same in the manner required by statute: Gen. Stats. of 1889, par. 1132. There being no revocation, the power of attorney must, under the authority cited, be held valid and effectual.

The next inquiry is, whether the doctrine of *lis pendens* applies in actions for divorce and alimony, and whether Elliott was a *pendente lite* purchaser. In her petition for divorce and alimony, Mrs. Wilkinson stated at length the grounds of divorce; the necessity of alimony for the support of herself and family; and that this land, particularly describing it, constituted the principal property of the defendant; and she prayed that the rents of the land should be paid to her, and that the land itself should be decreed to her as permanent alimony. The law provides that when a divorce is granted to the wife

on account of the fault of the husband, she shall be restored to all her lands which have not been disposed of, and shall be allowed such alimony out of her husband's real and personal property as the court shall think reasonable: Civ. Code, sec. 646. The general rule is, that one who purchases from a party to an action the subject-matter of the litigation is bound by the judgment subsequently rendered. It is essential to the doctrine of *lis pendens* that the litigation should be about some specific thing to be affected by the result of the action, and that the particular property should be so described and pointed out by the proceeding as to give notice to the whole world that they intermeddle at their peril: Freeman on Judgments, secs. 196, 197. It is contended that the doctrine has no application in actions for divorce and alimony, because the matter upon which the jurisdiction acts is the *status* of the parties, and not the disposition of the property. In our state, however, both questions may be the subject of litigation in the same action. If a divorce is asked on account of the fault of the husband, the wife may ask not only that all her own land may be restored to her that has not been disposed of, but may describe particular property belonging to the husband, and ask that the same may be set apart for her as permanent alimony. When this is done, the property is made the subject-matter of litigation, and is brought within the jurisdiction of the court, and any one who purchases the same should be bound by the judgment or decree thereafter rendered. If in such an action there was no specific property pointed out, but only a general prayer for alimony, the doctrine would not apply, for the reason that the alimony might be awarded out of either real or personal property; and as no particular property was described and made the subject-matter of the litigation, no one could have notice that any particular property was involved. Although the courts are not in accord upon the question, the prevailing and better opinion is as stated by Bennett on *Lis Pendens*, section 99: "The primary object for which the suit is brought is not material, provided the court has jurisdiction of the property for secondary purposes; and so it would seem that where a bill for divorce and alimony is filed by the wife against the husband, and there is no special allegation in it pointing out any particular property which is sought to be charged with the payment of the alimony, there will be no *lis pendens* as to either real or personal property of the defendant. Such a case cannot be distin-

guished from those where the action is professedly *in personam*, and where the contention in the case is entirely of any particular property. The same results, of the advantage to the public, — the same argument, founded upon public policy, — would exist in the one class as in the other. If, however, the bill should contain special allegations, — should point out particular real or personal property, — and, within the limits of the manifest jurisdiction and powers of the court to grant the relief, should seek to have alimony assigned out of such specific property, there would be constructive notice of the *lis pendens*." See also *Powell v. Campbell*, 20 Nev. 232, *post*, p. 000; *Brightman v. Brightman*, 1 R. L. 112; *Daniel v. Hodges*, 87 N. C. 98; *Ulrich v. Ulrich*, 3 Mackey, 290; *Tolerton v. Williard*, 30 Ohio St. 579; *Vanzant v. Vanzant*, 23 Ill. 536; *Draper v. Draper*, 68 Ill. 22; *Sapp v. Wightman*, 103 Ill. 150.

The question remains, however, whether the action of divorce was so pending at the time the land was transferred as to make Elliott a purchaser *pendente lite*. The plaintiff had executed a power of attorney conferring authority on Wilkinson to convey the land. It was conveyed before Elliott had actual notice that a proceeding for divorce was begun or in contemplation, as we are bound to assume from the finding of the court. The petition for divorce was prepared, and indorsed as filed, it is true, before the sale was made; but, as we have seen, it was immediately taken from the office. No *præcipe* for summons was then filed, nor was the summons issued in the case until after the conveyance was made. The code prescribes that "when the petition has been filed, the action is pending so as to charge third persons with notice of its pendency, and while pending, no interest can be acquired by third persons in the subject-matter thereof as against the plaintiff's title; but such notice shall be of no avail unless the summons be served or the first publication made within sixty days after the filing of the petition": Civ. Code, sec. 81.

Was the handing of the petition to the clerk, and his mere indorsement thereon, a sufficient filing within the meaning of this statute? It seems to us that it cannot be so held. The filing contemplated by the statute is to place the petition in the custody of the clerk, there to remain subject to inspection by all interested parties. "File" meant, at common law, "a thread, string, or wire upon which writs and other exhibits in courts and offices are fastened or filed for the safe-keeping and ready turning to the same": Wharton's Law Lex.; Bou-

vier's Law Dict. The modern method of filing papers is to place them in the official custody of the proper officer, to be kept as a permanent record, and the making of an indorsement thereon by the officer of the time they were received. According to Bouvier, "a paper is said to be filed when it is delivered to the proper officer, and by him received to be kept on file." The mere handing of a petition to an officer for indorsement, and for a temporary purpose, cannot be regarded as a filing within the meaning of the statute of *lis pendens*. It must be placed in the custody of the clerk as a permanent official record, and for the purpose of giving notice to all what is the nature and scope of the litigation. The statute requires that all such papers shall be safely kept in the custody of the clerk; but in this case it would seem that the petition was not handed to the clerk to be received and kept by him as a permanent record. It seems probable that, for some reason, the plaintiff did not desire the purpose and scope of the action to be known until an order of injunction could be obtained. Her conduct, however, was such that a stranger to the action had no opportunity of informing himself what property, if any, was involved in her proposed action. Shall she have the benefit of a notice based on an alleged record, when by her own act she has rendered an examination or search of the record abortive? Before the sale of the land, the defendant did in fact, through an attorney, make inquiry and search as to whether there was anything of record affecting the title to this real estate, and was told by the clerk that there was nothing, and no petition was found in the custody of the clerk, where such papers are kept when they are filed. To adopt the rule invoked by the plaintiff would tend to the encouragement rather than to the prevention of fraud. Before the doctrine of *lis pendens* will apply, the petition should be actually filed and made a permanent record, with the *bona fide* intention of proceeding with the prosecution of the action, and it should be kept on record, open to inspection by the whole world. It is said that it is the intention and act combined which makes the filing of a petition or commencement of an action effective. Under a statute which provides that the filing of a petition constitutes the commencement of an action, it was held that a petition delivered to the clerk of the court, with instructions not to issue process until further instructions were given, is not the commencement of an action so as to prevent the running of the statute of limitations, and

that it should be treated as having been left with the clerk in his individual capacity as bailee: *Maddox v. Humphries*, 30 Tex. 494; Bennett on *Lis Pendens*, sec. 42.

When the plaintiff handed her petition temporarily to the clerk, she did not ask for nor obtain the issuance of a summons,—an essential step to the institution of an action. It was apparently the intention that the acts and purposes of the plaintiff should be concealed from all until the petition was finally returned and deposited with the clerk to be kept by him as a permanent record. It is our opinion that until the petition was permanently placed on record, with the *bona fide* purpose of diligently proceeding with the litigation, the action cannot be regarded as pending, within the meaning of section 81 of the code. Under the findings of the court, it must be held that Elliott had no actual notice of the allegations of the petitions, or of the purposes of the plaintiff; and having neither actual nor constructive notice, he cannot be regarded as a *pendente lite* purchaser.

The judgment of the district court will be affirmed.

AGENCY—HUSBAND AS AGENT OF WIFE.—The husband of a married woman may be by her constituted her agent for the management of her separate estate: *Brown v. Thomson*, 31 S. C. 436; 17 Am. St. Rep. 40. A husband may execute a conveyance of his wife's realty under authority of a power of attorney from her: *Weisbrod v. Chicago etc. R. R. Co.*, 48 Wis. 35; 86 Am. Dec. 743. *Contra*, *Cardwell v. Rogers*, 76 Tex. 37.

LIS PENDENS.—Purchasers of realty, pending a suit with respect thereto, are deemed to have notice of the claims set up in such suit: *Evans v. Welborn*, 74 Tex. 530; 15 Am. St. Rep. 858, and note. Although the prosecution of a divorce suit might result in a decree which would affect the real property of the defendant, yet such property is not specifically the subject of the litigation, and by reason thereof is not withdrawn from such burdens as might legally be imposed upon it, and a purchaser thereof at a judicial sale is not subject to the rule of *lis pendens*: *Houston v. Timmerman*, 17 Or. 499; 11 Am. St. Rep. 848. A right to alimony confers no lien upon the specific property of a husband, but is personal against him: *Almond v. Almond*, 4 Rand. 662; 15 Am. Dec. 781. *Lis pendens* has no application to an action for a divorce and a petition for alimony: *Feigley v. Feigley*, 7 Md. 567; 61 Am. Dec. 375.

LIS PENDENS BEGINS TO RUN WHEN: See *Kellogg v. Fancher*, 23 Wis. 21; 99 Am. Dec. 96, and cases cited in note.

CASES
IN THE
SUPREME COURT
OF
MICHIGAN.

WEBBER v. JACKSON.

[79 MICHIGAN, 175.]

WITNESS — PROOF OF FRAUD. — Plaintiff who puts defendant on the stand for the express purpose of showing his fraud does not thereby give him credit for honesty. His testimony is to be judged according to its merits, and creates no estoppel.

FRAUD, PROOF OF. — While fraud will not be assumed without proof, still, it is oftener shown by circumstances than in any other mode; and when things appear that are contrary to the ordinary ways of honest business men, and call for explanations which might be but are not given, fraud will be inferred. When the questionable transactions occur frequently, and are the general characteristics of the conduct and statements of the parties, it is their own fault if they are held to the consequences.

FRAUDULENT CONVEYANCE — DEED EXECUTED BY ONE BROTHER TO ANOTHER, without the signature of the grantor's wife, and then recorded, but never delivered, the grantor remaining in possession and receiving the rents and profits without accounting for them, is fraudulent and void as against a judgment creditor of the grantor, especially when such deed was executed during the pendency of the action, and neither of the parties to it state any of the facts surrounding its execution, or any consideration therefor, except the statement that, if any such deed was made, it was executed in good faith and for a valuable consideration, upon a settlement between them. The production of notes many years past due and otherwise suspicious looking, claiming them as evidence of indebtedness to satisfy which such deed was executed, will not give it validity as against such judgment creditor.

S. G. Higgins, and Wiener and Draper, for the appellant.

William H. Sweet, for the respondents.

CAMPBELL, J. Complainant filed a judgment creditors' bill in aid of execution, and to reach equitable assets.

On September 26, 1884, he recovered a judgment in a suit upon a former judgment indebtedness against Andrew E. Jackson for between seven and eight thousand dollars. In April, 1884, while this suit was pending, it is claimed by defendant Timothy W. Jackson that he bought in good faith, and for a completed valuable consideration, a considerable amount of real estate in Saginaw County from his brother Andrew, being the land levied on by complainant; the consideration being \$6,737.74 of past indebtedness given up.

The validity of this alleged arrangement is the only important question before us. If that was valid, there seems to be nothing else to get at as equitable assets or personalty. If it was not valid, its rescission involves the subsequent dealings in regard to rents, and other incidental profits and property, based on the ownership of the land.

The defendant Andrew E. Jackson, instead of answering the bill seriously, filed a so-called "answer," which is full of impertinence, in the popular as well as the legal sense of that word, which deserves censure. As no answer under oath was asked, it amounts to nothing, except so far as it professes to show the nature of the transfer to Timothy; and in this it is not clear. Timothy, who is the defendant chiefly interested, ostensibly claimed to be a *bona fide* purchaser for valuable consideration. His answer amounts to no more than an assertion of the fact, without explanation. But instead of averring the fact that there was a conveyance, and that it was for value, he contents himself with saying that the conveyances, "if any were made by said defendant Andrew E. Jackson to this defendant, were made in good faith, and for a valuable consideration."

Such an answer is not only without point, but it asserts no rights whatever in defendant, and is a circumstance of some meaning. Complainant put Andrew on the stand, and in a long examination, in which direct and cross-examination alternate frequently, the defense is, rather shadowed out than plainly sworn to, that in April, 1884, Andrew went to the state of New York, at Timothy's request, and had an accounting with Timothy, and arrived at a balance due of the sum stated. It is not suggested or shown that Andrew had any counter-claims. The amount of debt is said to have been figured up by adding together several notes and express receipts, which are produced and identified by Andrew, but not by Timothy, who, however, says the amount named in the deed was due for

loans. None of those items accrued within the period of limitation, except one. All the items of notes were, with that exception, dated in 1874, 1875, and 1876, and payable at from ten to thirty days, except one, of December 5, 1874, for \$130, at six months. Among these notes was one thirty-day note, of \$3,477.17. None of them had any place of payment. In each of them the word "order" had been changed to "bearer," which is a very uncommon thing in such business. Most of them had no appearance of handling. All were on the same printed or lithographed form, got up some years before, in the days of revenue stamps, and most of them had the left-hand ornamental portion torn off, wholly or partially. There is no explanation why they, or some of them, had never been demanded or discussed during their legal life. There was no attempt to show that any of these notes represented any particular money or other transaction. None of them was identified by Timothy; but he did swear that all of the notes and other evidences of debt were surrendered to Andrew in the spring of 1884, when in New York, and that the settlement was then completed; which is not true, literally, at least.

In this connection it may be noted that while, according to both parties, the settlement was the result of urgency, from Timothy, which seems to have been a single instance of solicitude after many years of quiet, and both say it was completed, no writing was made on either side, and no haste was shown in conveying. A paper is produced, purporting to be a letter from Timothy to Andrew, dated May 10, 1884, and within two weeks of the alleged settlement, as follows:—

"MR. A. E. JACKSON.

"Sir,—As you have executed the deed of property to me as you said you would when here, now see if you can find any one to lend money and fill out mortgage, and send to me, and I will execute it, and return. I want twelve hundred or fifteen hundred dollars, five or ten years. TIM W. JACKSON."

Timothy does not refer to this in his testimony. Andrew, according to his testimony, never wrote him on business after his return to Michigan. No attempt seems to have been made to borrow money, and nothing more was said by any one concerning this matter. The testimony shows both defendants to be intelligent men, of some business experience. At this time the deed was not made. Andrew, at some time or other, drew it up himself. He did not get his wife to execute it. It

was dated April 28, 1884, but was not witnessed or acknowledged until June 23d, when it was recorded. It was never sent or delivered to Timothy, and it does not appear whether he heard of it at all before suit. Andrew continued to use the property and receive its returns, under what he claims to have been an agreement with Timothy to do so on shares. Timothy says nothing of any such agreement, never received a cent of the proceeds, and never asked for it, and heard nothing from Andrew about that, or any other matter which related to his supposed interests.

It is claimed by counsel that because complainant swore Andrew, he must be considered as asserting his veracity. No such difficulty exists concerning Timothy, who utterly fails to throw any satisfactory light on what concerns him much more than it concerns Andrew. But it seems a little incongruous to claim that a party who puts a defendant on the stand for the express purpose of showing his fraud thereby gives him credit for honesty. This same claim was set up in *Roberts v. Miles*, 12 Mich. 297, where it was held by this court that, whatever risks may be run in doing so, the testimony is to be judged according to its merits, and creates no estoppel.

We have no disposition to go into conjectures concerning the real character or origin of some of the very suspicious documents before us; but a review of the whole record convinces us that this transaction was not only meant to avoid payment of a claim which had no defense, but that there was no genuine sale at all. All of the circumstances indicate that it was a sham throughout, and that Timothy's name is used to hold what has never been anything but Andrew's property. The testimony is evasive, and too vague to explain what needed explanation, and what both parties—Timothy as well as Andrew—must have been able to explain. While fraud is not to be assumed without proof, it is nevertheless oftener shown by circumstances than in any other way. When things appear that are contrary to the ordinary ways of honest business men, and call for explanations which might be but are not given, it is no violent inference to conclude that there is something wrong. And where this occurs repeatedly, and is the general characteristic of the conduct and statements of the parties, it is their own fault if they are held to the consequences.

We think that the conveyance to Timothy should be declared void as against complainant's levy and judgment, and

that all the proceeds, so far as they can be reached, and all the dealings connected with the land, must be regarded as belonging to Andrew. The complainant is entitled to a receiver, if he chooses to have one, and to have the usual assignment to him under the practice in judgment creditors' bills, and to pursue the usual remedies in such cases. He is entitled to a reversal of the decree below, with costs of both courts, and to enter a decree in accordance with these views.

FRAUD, HOW PROVEN. — Direct evidence of fraud can seldom be obtained; but it may be shown by the conduct of the parties, the details of the transaction, and the surrounding circumstances: *Note to Brown v. Mitchell*, 11 Am. St. Rep. 759. Mere suspicion alone is not sufficient to establish fraud; it must be proved: *Tulear v. Chase*, 66 Minn. 476; 14 Am. St. Rep. 577.

WITNESSES, IMPEACHMENT OF. — A party who puts his adversary upon the stand gives him an opportunity to testify in his own behalf, and waives the right to impeach him by attacking his credibility, but retains the right to contradict him by the testimony of other witnesses inconsistent with his: *Helms v. Green*, 105 N. C. 251; 18 Am. St. Rep. 893. Compare note to *Allen v. State*, 73 Am. Dec. 776. Where one of the parties to a suit is examined out of court, the opposing party may introduce such examination in evidence, but does not thereby so make the party his witness as to preclude him from impeaching him by showing that he has made inconsistent statements out of court: *Creecher v. Aganbroad*, 122 Ind. 385.

FRAUDULENT CONVEYANCES. — For conveyances between parties who are in a near relationship to each other, considered as fraudulent, see *Helms v. Green*, 105 N. C. 251; 18 Am. St. Rep. 893, and note; note to *Brown v. Mitchell*, 11 Am. St. Rep. 759.

O'LEARY v. BOARD OF FIRE AND WATER COMMISSIONERS OF MARQUETTE.

[79 MICHIGAN, 281.]

MUNICIPAL CORPORATIONS — CORPORATE AGENCY, WHEN LIABLE FOR NEGLIGENCE OF SERVANT. — An incorporated board of water commissioners, the members of which are appointed by the corporate body of the city, and the general and sole purpose of whose powers, incidentally conferred, is to examine and consider all matters relative to the water supply of such city, and which has no taxing power, and can only receive from the city the product of taxes sufficient to pay its bonds and operating expenses, and whose property is not subject to execution, is not an agency officially liable for the negligence of its servants.

CORPORATION, WHAT CONSTITUTES. — **BOARD OF WATER COMMISSIONERS,** liable as well as competent to be impleaded, to make contracts, hold property, have a seal, make by-laws, and generally "to do all legal acts which may be necessary and proper to carry out the effect, intent, and object of the act" creating it, although not in terms declared to be a corporation, is made such by the powers conferred.

MUNICIPAL CORPORATION, WHAT IS NOT. — A local corporation, created to serve municipal purposes, but which is not the direct representative of the people of its locality, is in no sense a municipal corporation.

MUNICIPAL CORPORATIONS — LIABILITY FOR NEGLIGENCE OF OFFICERS. — Municipal corporations are not usually responsible in damages for the neglect of their officers, unless made so by statute, nor can such statutory liability be enlarged.

MUNICIPAL CORPORATIONS — LIABILITY FOR NEGLIGENCE OF AGENTS. — A city engaged in constructing a work which is its private property as a municipality, and not a mere public easement, and which is done under city employment or contract, is responsible for injuries caused by neglect in its process or construction, in the same manner that it is responsible for such action directly injuring private property.

NEGLECT, WHEN SUBJECT TO LEGISLATIVE CONTROL. — It is for the legislature to determine how far, if at all, a corporate body whose negligence is imputed, and in no sense actual, shall be made subject to action for the misconduct of its employees.

IMPUTED NEGLIGENCE IS PURELY A QUESTION OF PUBLIC POLICY, and subject to legislative regulation.

F. O. Clark, for the appellant.

Mapes and Kinkade, for the respondent.

CAMPBELL, J. Plaintiff was injured by falling into a ditch dug by the servants of defendant for laying water-pipes. He recovered damages to an extent not held by the trial judge to be beyond the merits of the case; and if defendant is liable at all, there seems to be nothing in the record to show error in holding the judgment regular and proper in law, although, as not uncommon in such cases, the jury gave the plaintiff the benefit of all the disputed facts. But it is claimed that under the statutes regulating its powers, and those of the city of Marquette, the defendant cannot be held legally responsible for the negligence of its servants, in an action in tort for damages. That the individual wrong-doer, if there was one, by whose misconduct plaintiff was hurt, is responsible, is not disputed. Whether the corporation in charge of the public ways is liable is not before us. The sole question is, whether this corporation, which is created to subserve certain important municipal purposes, has been made responsible, by law, for such accidents, when, if not incorporated, it is not shown that it would be, is the only matter for our consideration; and the differences existing under different charters are such as to leave the matter to be decided by its own facts.

The defendant was incorporated by "an act to create a board of water commissioners in the village of Marquette, and to define its powers and duties," approved March 2, 1869. The subsequent incorporation of the city merely made the ne-

cessary changes to meet the change in government. Although not in terms declared to be a corporation, the powers given them are in such language as to make them such. They are liable, as well as competent, to be impleaded, to make contracts, and hold property, to have a seal, and make by-laws, and generally "to do all legal acts which may be necessary and proper to carry out the effect, intent, and object of this act." As all of their powers are confined legally to the scope of the statute, it is necessary to consider them. The members derive their appointment from the corporate body of the city, and not from the people. By section 6 they are required "to examine and consider all matters relative to supplying said [city] of Marquette with a sufficient quantity of pure and wholesome water for domestic use, also to provide suitable and efficient means for the extinguishment of fires."

This is the general and sole purpose of all their incidental powers. By subsequent sections they are empowered, under approval of the electors by vote on that question, to issue bonds to a limited extent, and, if unable to pay, to renew them. They are authorized to report to the city council, which is empowered, but not expressly required, to raise by tax any sums beyond the revenue of the board necessary to pay principal or interest on the bonds, or "any deficiency in operating expenses." They are authorized, "after the necessary means have been procured, as herein provided," to purchase necessary lands and materials, and construct reservoirs, buildings, machinery, and fixtures to supply water, and to provide means for fire protection, and are given, for the purposes of the "fire department," the powers which were before possessed by the village. They are empowered to lay pipes for water, and to build hydrants, and to employ such persons as they deem necessary to perform their duties. They have power to levy water rates on consumers on an equitable basis. They can procure lands by condemnation, where needed, and on payment of the damages into the city treasury, may get the title. All materials contracted for or procured by them are exempt from execution.

It may be important, in this connection, to consider the legal position of this board in its functions. While it is a local corporation, created to serve municipal purposes, it is in no sense a municipal corporation, within the legal meaning of that term. It has been settled in this state that there can be no municipal corporation that is not the direct representative

of the people of its locality: *Attorney-General v. Board of Councilmen*, 53 Mich. 213; 55 Am. Rep. 675; *Altor v. Board of Auditors*, 43 Mich. 76; *People v. Harbut*, 24 Mich. 44; 9 Am. Rep. 103; *Board etc. v. Board of Auditors*, 68 Mich. 576; *Board of Commissioners v. Common Coun. of Detroit*, 28 Mich. 228; 15 Am. Rep. 202; *Attorney-General v. Common Coun. of Detroit*, 29 Mich. 108; *Butler v. Detroit*, 43 Mich. 552. In several of these as in other cases the doctrine has been recognized that the establishment of corporations to act as municipal boards or agencies did not give them any governmental municipal authority; and it is difficult to see how the incorporation or non-incorporation of the same board can change its character in the performance of public duties. The furnishing of water and the establishment of a fire department are among the almost universal functions of cities; and the incorporation of water and fire boards appointed by the city is only a convenient way of removing that business from the constant interference of the ordinary city authorities, with such safeguards as are deemed best for that purpose.

It was held in *Detroit v. Blackoby*, 21 Mich. 84, 4 Am. Rep. 450, that cities and municipalities are not usually responsible in damages for the neglect of persons in public office, unless made so by statute; and it has been held in numerous cases since, that the statute liability cannot be enlarged: *Detroit v. Putnam*, 45 Mich. 263; *McKellar v. Detroit*, 57 Mich. 158; 53 Am. Rep. 357; *McArthur v. Saginaw*, 58 Mich. 357; 55 Am. Rep. 687; *Williams v. Grand Rapids*, 50 Mich. 51; *Keyes v. Village of Marcellus*, 50 Mich. 439; 45 Am. Rep. 52. On the other hand, it was held in *Detroit v. Corey*, 9 Mich. 165, 80 Am. Dec. 78, that where a city is engaged in making a work which is its private property as a municipality, and not a mere public easement, and done under city employment or contract, it is responsible for injuries caused by neglect in its process of construction, as it is for any such action as directly injures private property: *Pennoyer v. Saginaw*, 8 Mich. 534; *Ashley v. Port Huron*, 35 Mich. 296; 24 Am. Rep. 552; *Defer v. Detroit*, 67 Mich. 346. But it is not usually liable in other cases. If this defendant was the representative directly of the people of Marquette to govern the city, with power to tax the people to carry out its plans, and held the property in its charge by proprietorship for its own purposes, it would seem to come within the Corey case. But a city represents the people for all the strict purposes of local government, and has power to raise its own revenue. The legislature,

in requiring towns, cities, and villages to answer in damages for neglect to keep roads in repair, at the same time found it necessary to remove one of the recognized difficulties arising from lack of funds, by enabling them to provide by taxation for all such purposes. The purposes for which the present municipal agency was created are entirely for the protection of the city from fire, and for promoting its health by a supply of good water. The defendant is only enabled to obtain and hold such property as will be instrumental to that end. Every seizure of such property, if allowed, would be a diminution of the power of defendant to perform its public duties in regard to public health and safety. It not only has no taxing power, but the city has no power to give it any taxes, except such as will enable it to pay its bonds and "meet any deficiency in operating expenses." Its property is not subject to execution. It cannot be true that such an agency can be officially liable to suits for liabilities, where it has no legal means of raising funds for payment. As already suggested, unincorporated boards are not so liable; and there is no obvious reason why the mere fact of incorporation, with no change of powers, can change their liabilities.

We cannot consider, on this record, any other question but the liability of this board. We know of no other instance in which a public board can be subjected to suit without means of raising money from the tax-payers. It is for the legislature to determine how far, if at all, a body whose negligence, if it is so called, is imputed, and in no sense actual, shall be made subject to suit for the misconduct of its employees. There are many cases where such liability does not exist, except against the immediate individual wrong-doer. The person injured is not harmed any more where there are several persons liable than where there is only one. Imputed negligence is purely a question of public policy, and subject to legislative regulation. No one can be bound by this record except the immediate parties to it, and it would be improper to go beyond it.

The judgment should be reversed, with costs, and without a new trial.

MUNICIPAL CORPORATIONS — LIABILITY FOR NEGLIGENCE OF SERVANTS. — Municipal corporations are not ordinarily answerable to persons suffering injuries through the negligence of their officers, agents, or servants: *Chope v. Eureka*, 78 Cal. 588; 12 Am. St. Rep. 113. But such liability may be expressly fixed by statute: *Downing v. Mason Co.*, 87 Ky. 206; 12 Am. St. Rep. 473. To the same effect, substantially, is the rule laid down in *Edgerty v. Concord*, 62 N. H. 3; 13 Am. St. Rep. 533, and note.

ROBINSON v. FLINT AND PERE MARQUETTE RAILROAD COMPANY.

[79 MICHIGAN, 323.]

HIGHWAYS, RIGHT TO USE, FOR PUBLIC PASTURE. — The owner of animals must keep them upon his own premises, and while he may use a public highway for the purpose of driving them from place to place, or may pasture them therein opposite his own premises, he cannot use such highway for a public pasture, nor pasture opposite the land of others even when the animals are in charge of a keeper. Such use is not an incident of travel for which the highway is dedicated, and it is doubtful whether authority could be conferred upon the proper officers to permit such use.

RAILROADS — RATE OF SPEED OF TRAINS. — Where a railroad company has complied with the law in regard to fencing its road and constructing crossings, and has provided its engines and cars with proper appliances, it is entitled to the use of the road for the passage of trains at all times, to increase the speed of its regular trains when behind time, and to run special or wild trains at all times. In such cases, a rate of speed of sixty miles an hour is not negligence when the train is running outside of villages or cities, or through a sparsely settled community, and when the law does not limit the rate of speed.

NEGLECTENCE MUST NOT ONLY BE ALLEGED AND PROVEN, but it must also be shown that it caused the injury complained of.

RAILROADS — RATE OF SPEED — LIABILITY FOR INJURY TO ANIMALS. — Railroad companies are not required to slacken the speed of their trains at the numerous highway crossings in the country, which they are passing every few minutes, nor are they obliged to slacken their speed when cattle are in the highway near the track. It is only when the engineer, in the exercise of due caution, sees danger, that he is required to slacken speed. He must then take all proper steps to avoid danger. Still, in such case, his first duty is for the safety of his passengers, and when he cannot stop his train before striking the animals, he is justified in running at a high rate of speed, if in so doing there is less danger of derailling his train, though the result is to render the escape of the animals more difficult.

NEGLECTENCE — CATTLE RUNNING AT LARGE. — An owner, by turning his cattle at large in a public highway without a keeper, is guilty of contributory negligence, and cannot recover for injury thereto from collision with a train, when the railroad company has complied with the law in regard to fences and crossings, although the train was running at a high rate of speed at the time of the accident.

RAILROADS, LIABILITY OF, FOR INJURIES TO CATTLE RUNNING AT LARGE. — The owner of cattle running at large without a keeper has no recourse against a railroad company for the loss of his property from collision, in the absence of allegation and proof of reckless, wanton, and willful conduct on the part of the company. On the other hand, such owner is liable, in such case, for damages resulting to the company or its passengers.

CONTRIBUTORY NEGLIGENCE — CATTLE RUNNING AT LARGE. — A person who permits his animals to run at large where it is highly probable, if not inevitable, that they will run into dangerous places, will be judged

by the same rule as when he places himself in the presence of danger and thereby suffers injury which his own prudence might have avoided. In either case he cannot recover for the injury.

W. L. Webber, for the appellant.

John Giberson, for the respondent.

GRANT, J. Plaintiff's ox was killed upon a highway, while crossing over the defendant's road, by a train of cars. He brought suit, claiming that the ox was killed by defendant's negligence.

The declaration contained three counts. The first count alleged that the negligence consisted in running its train at a high and dangerous rate of speed, and neglecting to slow up when it was seen that the ox was in danger. The second count alleged that the defendant carelessly and negligently caused an embankment of sand and gravel to be formed on each side of its track, from two to three feet high, and permitted the same to remain several days, and that the ox was retarded in consequence while crossing the track. The third count combines both these allegations of negligence, and the further one that defendant neglected to sound the bell and blow the whistle forty rods from the crossing, as required by statute.

The undisputed facts are these: The crossing was on a public highway in the country, near the plaintiff's farm. There were two crossings, one of which led into the plaintiff's yard, and on which the ox was killed; but both were in the highway, and used by the public. The train was a wild one; that is, one which was not running upon schedule time. The ox was one of a herd about fifteen in number. All the others had passed over the track before the engine reached the crossing. Plaintiff saw the cattle and the train. He testifies that the engineer blew the customary danger signals — three sharp toots — when within about fifteen rods of the crossing. His cattle were running at large in the highway. He knew this, for he and his son were at work in his field a short distance away, and saw them. He testifies: "I saw quite a number of the cattle just a little while before the train came down. They were about three or four rods east of the crossing, in the public highway."

The bell was rung automatically, by air. The testimony as to the speed of the train, the blowing of the whistle forty rods from the crossing, and the embankment of sand and

gravel, was conflicting. Some of plaintiff's witnesses estimated the speed at from fifty to sixty miles an hour. The engineer testified that he blew the whistle; that he was running about forty miles an hour, till within about twenty rods of the crossing, when he suddenly saw the cattle coming towards the track; that he immediately shut off steam, applied the brakes, and did all he could to stop the train, except to reverse the engine; that a reversal of the engine would have endangered the lives of those on board.

The important question submitted upon this record is this: Was the plaintiff guilty of contributory negligence in permitting his cattle to run at large in the public highway, near this crossing, without any keeper? By the common law, every person must keep his animals upon his own premises. He may use the highway for the purpose of driving them from place to place. He cannot use it for a public pasture. He may pasture in the highway opposite his own premises, for he is entitled to the herbage growing there. He is not entitled to pasturage opposite the lands of others, even when the cattle are in charge of the keeper: *Campau v. Kenan*, 39 Mich. 362; *Bertukistle v. Goodrich*, 53 Mich. 457. Such use is not an incident of travel for which the highway is dedicated to or appropriated by the public.

In *Campau v. Kenan*, 39 Mich. 362, it was doubted by this court whether authority could be conferred upon the board of supervisors or any other body to permit beasts to run at large upon public highways. A similar provision was held unconstitutional and void by the court of appeals of New York; *Tonawanda R. R. Co. v. Munger*, 5 Denio, 255; 49 Am. Dec. 239. Section 8, act No. 185, Laws of 1887, provided that the act should not apply to that portion of the state lying north of the tier of townships 12 north, unless so ordered by the board of supervisors of any county lying north of said tier of townships. The township in this case lies north of that line. That act, therefore, conferred no right to the use of the highway in that part of the state that did not exist at common law. The rule of the common law prevails in this state, and in many of the other states. The act above mentioned, therefore, has no bearing upon the determination of the question in issue.

It is to be presumed that the defendant had complied with the provision of the statute in regard to fencing its road, and constructing this crossing with due regard to

the safety of persons and property passing over it, and providing its engine and cars with the proper appliances. Having done this, it was entitled to the use of its road for the passage of trains at all times, to increase the speed of its regular trains when behind time, and to run special or wild trains whenever its business required. The law did not limit the rate of speed of its trains. The business of the country demands of railroads rapid transit, both for persons and property. It has nowhere been held that a speed of even sixty miles an hour is negligence, when a train is running through the country outside of villages and cities, or through a sparsely settled community. It is well known that trains are now being run in many parts of the country at the rate of fifty to sixty miles an hour.

It is difficult to see how the blowing of the whistle forty rods from the crossing would have prevented the injury. Juries must not be left to conjecture. Not only must the negligence be proven, but also it must be shown that it caused the injury. In *Union Pac. R'y Co. v. Shannon*, 28 Kan. 477, a case very similar in its facts to the case at bar, the following question was submitted to the jury: "As the plaintiff and his cattle were situated when the train was eighty rods west of the crossing, could a whistle blown upon the locomotive have prevented the injury?" To which the jury answered: "We do not know."

Under this answer, the court held that the omission to blow the whistle was unimportant in the case. A contrary finding by the jury in this case, as well as in that, would have been mere conjecture.

The fair and legitimate conclusion from the evidence in this case is, that the ox was killed while attempting to cross in front of the train, and because the engineer could not check the speed of the train in time to avoid the accident, after he saw the danger. Railroad companies are not required to slacken the speed of their trains at the numerous highway crossings in the country, which they are usually passing every few minutes. To do so would seriously and unnecessarily retard their and the public business. In fact, they could not well fulfill their contracts for the carriage of mails, passengers, and freight, and supply the growing demand of commerce. Nor are they obliged to slacken their speed when cattle are in the highway near the track. Only when the engineer, in the exercise of due caution, sees

danger, is he required to slacken the speed. He is then bound, from regard for the rights of all parties concerned, to take all proper steps to avoid the danger. But in such case the first duty of the engineer is for the safety of his passengers, and it is held that, when he cannot stop his train before striking the cattle, he is justified in running at a high rate of speed, if in so doing there is less danger of derailing his train, though the result is to render the escape of the cattle more difficult: 1 Thompson on Negligence, 506, and cases there cited.

In turning his cattle at large in the public highway near this crossing, without a keeper, the plaintiff was guilty of contributory negligence. Due regard for the safety of human life and property forbids a person to turn his dumb animals at large under such circumstances. This rule is dictated alike by good sense and the feeling of common humanity. The owner is conclusively presumed to know that his animals may get upon the crossing, and thereby incur not only the risk of their own destruction, but also endanger the lives of passengers and the safety of property of great value. The destruction of plaintiff's ox is as directly attributable to his own negligent act as to any negligence alleged against the defendant.

In the case of *New York etc. R. R. Co. v. Skinner*, 19 Pa. St. 303, the supreme court of Pennsylvania held that not only did the owner of cattle running at large have no recourse against the company for the loss of his property, but that he was liable for damage resulting to the company or its passengers. In that case the court say: "If an owner suffer his cattle to be at large, it must be at a risk of losing them, or paying for their transgressions. The very act of turning them loose is negligence. . . . That he is not answerable . . . criminally . . . is because mischief was not intended by him."

In *Bennett v. Chicago etc. Ry Co.*, 19 Wis. 148, plaintiff sued to recover damages for injury to a colt which had strayed from a common upon the depot grounds of the defendant. The court say: "In permitting the colt to run at large on a common adjoining the railroad and depot grounds, from whence he would probably, if not certainly, stray upon the track, and be exposed to collision with trains of cars passing by, thereby endangering the lives and persons of all on the trains, the plaintiff himself was guilty of very great negligence."

And in *Chicago etc. R'y Co. v. Goss*, 17 Wis. 433, the court say: "If the owner rashly or carelessly allows his oxen or horses to go upon the road, and they are killed by the gross negligence of the company, . . . it is gross negligence against gross negligence, and there can be no apportionment of damages. In such case it would seem that nothing short of proof of wanton or malicious injury would entitle him to compensation."

In the case of *Louisville etc. R. R. Co. v. Ballard*, 2 Met. (Ky.) 177, cited by plaintiff's counsel, the court held that a peculiar obligation devolved upon the owner of cattle to keep them off the tracks of railways, and that there could be no recovery unless the conduct of the company was shown to have been reckless, wanton, and willful. In that case the declaration alleged such misconduct. In this case no such misconduct is alleged, nor is there any evidence to show it. A man who permits his dumb beasts, which cannot reason or appreciate danger, to roam at large, where it is highly probable, if not inevitable, that they will run into dangerous places, ought to be judged by the same rule as when he places himself in the presence of danger, and thereby suffers injury which his own prudence might have avoided. In the latter case, courts almost uniformly hold that he cannot recover. On what principle can he be entitled to recover in the former? The plaintiff's contention would result in establishing the rule that he owes the defendant no duty in the care of his cattle upon public highways, and that he is entitled to the absolute presumption that the defendant's servants will always operate its trains with the care and vigilance required by law. This is not the rule: *Railroad Co. v. Trust Co.*, 23 Fed. Rep. 738. The circuit judge should have charged the jury that the plaintiff was guilty of contributory negligence, and instructed them to find a verdict for the defendant. It is unnecessary to notice the other assignments of error.

Judgment below reversed, and new trial ordered.

NEGLECTANCE — RAILWAYS — ANIMALS. — One who permits his cattle to be upon a railway track is guilty of negligence: *Chicago etc. R. R. Co. v. Patchin*, 16 Ill. 198; 61 Am. Dec. 65; *Tonawanda R. R. Co. v. Munger*, 5 Denio, 255; 49 Am. Rep. 239; and cannot recover damages, unless the cattle are killed through willful or gross negligence of the company: *Chicago etc. R. R. Co. v. Goss*, 17 Wis. 423; 84 Am. Dec. 755, and note. See extended note to *Savannah etc. R'y Co. v. Geiger*, 58 Am. Rep. 703-707; note to *Barnes v. Salem etc. R. R. Co.*, 96 Am. Dec. 680-682. In North Carolina and Oregon it has been decided that the owner of cattle is not guilty of contributory

negligence when his cattle stray upon a railway track and are killed: *Bethen v. Raleigh etc. R. R. Co.*, 106 N. C. 279; *Moses v. Southern P. R. R. Co.*, 19 Or. 385. But in *Moser v. St. Paul etc. R. R. Co.*, 42 Minn. 480, it was decided to be contributory negligence on the part of the owner to voluntarily permit a valuable horse to run at large, contrary to law, in the vicinity of a railroad; and it makes no difference that the horse may be on a highway upon its owner's premises: *Johnson v. Minneapolis etc. R'y Co.*, 43 Minn. 207.

HARRISON v. DETROIT, LANSING, AND NORTHERN RAILROAD COMPANY.

[79 MICHIGAN, 402.]

MASTER AND SERVANT—LIABILITY FOR NEGLIGENCE OF FELLOW-SERVANT.

—The master is not liable for injuries personally suffered by his servant through the negligence of his fellow-servant acting as such while engaged in the common employment, unless the master is chargeable with negligence in the selection of the servant in fault, or in retaining him after notice of his incompetency.

MASTER AND SERVANT—LIABILITY FOR NEGLIGENCE OF SUPERIOR SERVANT.

—When a superior servant orders one under him to perform work differing from that for which he is employed, and which results in injury, the superior is guilty of an abuse of authority, and the master is liable.

MASTER AND SERVANT—FELLOW-SERVANTS.—When the negligence of a railroad fireman or engineer in failing to ring the bell on the engine is the immediate and proximate cause of an injury to a section-hand, the latter cannot recover, as the parties are fellow-servants.

MASTER AND SERVANT—CONTRIBUTORY NEGLIGENCE OF SERVANT.—A servant cannot recover damages for the negligence of his superior servant, if he was aware of a danger which the superior servant did not apprehend, and being aware of it, did not seek to save himself from injury; and the fact that he was ordered to continue work would not justify him in doing so in the face of danger which was apparent to him.

MASTER AND SERVANT—NEGLIGENCE OF MASTER OR SUPERIOR SERVANT.

—Where a peculiar risk, commanded by the master or a superior servant, is not obvious, an inferior servant has a right to assume that he is not being put in peril, and is not bound to investigate the risk before obeying his orders. He need not set up his own judgment against that of his superiors, but may rely upon their advice, and still more upon their orders, notwithstanding many misgivings of his own.

MASTER AND SERVANT—NEGLIGENCE OF MASTER—SPECIAL RISKS.

—When the master directs the servant to do some dangerous act which could be made safe by special care on the part of the master, the servant may assume that such special care will be taken; and failing to exercise such care, the master is liable.

MASTER AND SERVANT—NEGLIGENCE OF MASTER—LIABILITY FOR ACTS OF HIS AGENT.

—When a master places the entire charge of his business, or of a distinct branch of it, wholly in the hands of an agent, exercising no discretion and no oversight, the neglect of the agent in

exercising ordinary care in the business of the master is a breach of duty for which the master is liable.

MASTER AND SERVANT — NEGLIGENCE OF FELLOW-SERVANTS. — A master is not liable to a servant for the neglect of his fellow-servant in doing or omitting to do a portion of the common work. This rule will not relieve the master, whether a corporation or a natural person, from the duty and obligation to servants to furnish safe machinery or other apparatus, and to observe all the care which the exigencies of the situation reasonably require, as well as to employ competent servants.

MASTER AND SERVANT — DUTIES OF MASTER. — The master must make such regulations and provisions for the safety of his employees as will afford them reasonable protection against dangers incident to the performance of their respective duties. His duty extends to the selection of competent persons to whom he may delegate his authority to take charge of and control the business in which the servants are employed.

MASTER AND SERVANT — WHO ARE FELLOW-SERVANTS. — Where parties are fellow-servants while engaged in the business of a natural person, they should be so considered when engaged in the business of a corporation; and if one is the agent or superior servant while engaged in the business of a corporation, and through his negligence another engaged in the same business is injured, and for whose injury the corporation is liable, then, under like circumstances, if it was the business of a natural person, the master should be held liable.

MASTER AND SERVANT — WHO ARE FELLOW-SERVANTS. — Whether or not persons employed in a common enterprise are fellow-servants is not to be determined solely from the grade or rank of the offending or of the injured servant. It is to be determined by the character of the act being performed by the offending servant. If it is an act that the law imposes on the master to perform, then the offending employee is not a fellow-servant, but a superior or agent, for whose acts the master is liable to his servants.

MASTER AND SERVANT — WHO ARE FELLOW-SERVANTS. — When the master has delegated to a servant the care and management of the entire business, or a distinct department of it, and has charged him with the performance of duties toward an inferior servant, which the law imposes upon the master, then the superior servant stands in the place of the master, and the rule *respondent superior* applies.

MASTER AND SERVANT — WHO ARE FELLOW-SERVANTS. — Whether or not one servant has power to employ and discharge other servants, is an important element in determining whether or not he is a superior servant for whose acts the master is liable; for when the offending servant has power to employ and discharge servants, and to direct and control the injured servant, and orders him to do an act within the scope of his employment, thereby exposing him to a risk not contemplated in his contract of service, and causing his injury, or where the master has charged one servant with the sole duty of providing proper materials and appliances for carrying on the work, and another servant is injured by the neglect of the former servant, the master is liable to the injured servant for injuries received while acting under the orders of the superior servant.

MASTER AND SERVANT — ROAD-MASTER AND SECTION-HAND NOT FELLOW-SERVANTS. — A road-master who has general charge of a division of a railroad and of the section-hands at work thereon, with power to em-

employ and discharge them, is not their fellow-servant, but is the representative of the company, which is responsible for his negligence in the performance of the duties delegated to him.

MASTER AND SERVANT — MASTER'S LIABILITY FOR NEGLIGENCE OF AGENT OR VICE-PRINCIPAL. — When a master appoints a middleman or agent with full power to employ and discharge those under him, and with full and absolute control of the work, the master is liable for his negligence.

Smith and Stevens, and Charles B. Lothrop, for the appellant.

John A. Fairfield; Isaac M. Turner, and Birney Hoyt, for the plaintiff.

LONG, J. This action is brought to recover for personal injuries sustained by the plaintiff through the claimed negligence of the servants of the defendant. On the trial the plaintiff had verdict and judgment for nine thousand dollars.

The plaintiff had been in the employ of the defendant company for about eight years, though for some portion of that time he had been laid off, by direction of those in charge of the works of the company. During that time, his employment had been confined to the work as a section-foreman, and hand under a section-boss. At the time of the injuries complained of, one George Light was the defendant's assistant road-master of the western division, having charge of its tracks from Stanton to Big Rapids, and from Howard City to Saginaw, — a line of about one hundred and fifty miles of defendant's road, — Mr. Doyle being the general road-master.

On the morning of November 11, 1887, Light having been ordered by Doyle, the general road-master, to go to Cedar Lake, east from Edmore, to move some telegraph-poles, ordered two section-foremen — Cushton, to whose gang plaintiff belonged, and Horton — to take their gangs there for that purpose. Light went with them from Edmore on a hand-car, and assumed charge and direction of the work. The poles were partially loaded on a flat-car standing on a side-track, and in loading were piled much higher on the side of the car farthest from the pile of poles than on the other, the car being blocked up to prevent its tipping. A freight train came along on the main track from towards Edmore, going eastward, when Light ordered the engine of this train to be detached for the purpose of moving the car upon which the poles were being placed, to another part of the yard. The engine, on being detached, proceeded eastward beyond the switch; and the switch being then turned, it was then backed in upon the

switch towards the car upon which the plaintiff was at work, — plaintiff, with two other men, being on the east end of the car, with his back towards the approaching engine, and standing on the poles about five feet above the deck of the car. Plaintiff claims that the engine was then about sixty feet from him, when he desisted from his work, and turned his head around, looked towards the approaching engine, and said to Light, who, plaintiff claims, was standing near the main track, and about ten feet east of the car on which plaintiff was at work: "George, this here car will about do; she is about level," — and at the same time plaintiff grabbed hold of the poles to protect himself if the engine came back to the car, when Light replied: "Roll another pole over. What the hell are you looking at? You have lots of time. Roll them over! Roll them over!"

While plaintiff and his witnesses place Light at this time some eight or ten feet east of the car, some other evidence puts him near the middle of it. When this order was given by Light, plaintiff resumed his work; and he testifies that he went to work because Light told him to; that Light was the boss of the gang that day. Plaintiff says that when he turned around to see, and saw the engine coming, he thought she was coming to make the switch to move the cars, and then he grabbed hold; but that when Light told him to go to work, he did the same as the rest, — went to work to roll more poles over to level the car up, — and did not think they were going to let the engine come back on the car until they got through. On being asked if he relied upon what Light said in that respect, he stated: "I had to do as he told me, or maybe I would get the red ticket. I thought he would not let the engine come back while we was to work on it."

While the plaintiff was so at work the engine was backed down against the car. Plaintiff was thrown off, and seriously, and, as it is claimed, permanently, injured, and in a condition which wholly prevents him from doing any kind of labor. It is claimed that Light took no steps to warn the plaintiff of the approach of the engine, or to prevent the engine from striking the car. Plaintiff also claims that the bell was not rung, and the jury so found; that he was listening for the bell, and, had he heard it, would have taken it as a signal of danger, and protected himself.

Mr. Light admits ordering the engineer to take the car upon which plaintiff and the others were at work, and move it to

another part of the yard, but denies that he gave the plaintiff the order claimed; says that he merely directed the men to level the poles on the car, but gave no other order until after the accident; that he stood with his back partly to the east, and at right angles to the east switch; that he saw the engine pass over the switch to the east and stop, and did not see it again until it struck the car. The defendant also contended that the bell was being rung while the engine was backing down.

At the close of the testimony, counsel for defendant requested the court to instruct the jury,—

"1. If you find that the injury to the plaintiff was caused by the negligence of Mr. Light, the assistant road-master, the plaintiff cannot recover, for the reason that the two were fellow-servants, and the master is not liable for an injury to one caused by the negligence of another."

"3. If you find that the plaintiff was ordered by Mr. Light to continue work while the engine was approaching the flat-car upon which the plaintiff was at work, but that at the same time the bell upon the engine was ringing, and the engine was backing up, then the plaintiff was guilty of contributory negligence in failing to heed the warning of the bell, and your verdict must be for the defendant.

"4. If you find that such order was given by Mr. Light, but that afterwards the bell upon the engine was rung as a warning of the approach of the engine to the flat-car, then the plaintiff was guilty of contributory negligence, and cannot recover in this action.

"5. If you find from the evidence that Mr. Light gave the order to the plaintiff to continue work as the engine was backing up, but that the fact of its near approach was not known to Mr. Light when he gave the order, and was known to the plaintiff, then the plaintiff was guilty of contributory negligence in failing to notify Mr. Light of its approach and to secure himself, and your verdict must be for defendant.

"6. If you find that Mr. Light gave the order as claimed by plaintiff, but that at the time of giving it the danger from the engine was not imminent, then the giving of the order was not the proximate cause of the injury, but the proximate cause was his failure subsequently to warn the plaintiff; and for such neglect the defendant is not liable, and the plaintiff cannot recover.

"7. If it was apparent to the plaintiff, when he looked

around to the engine, that the danger of the engine running into the car was then impending and imminent, then the plaintiff was guilty of negligence in obeying Light's order, and cannot recover.

"8. The evidence shows that if the bell had been ringing as the engine backed down, the plaintiff would have been warned, and would not have been injured; and I charge you that the omission to ring the bell was the proximate cause of the injury, and the plaintiff cannot recover.

"9. Under all the evidence in the case, the defendant is not liable for the injury to the plaintiff; and your verdict must be, no cause of action."

The court refused to give these instructions, but instructed the jury that the negligence of Mr. Light would be the negligence of the company, and for which a recovery might be had.

Defendant's counsel submitted five special questions for a finding of the jury thereon, as follows:—

"1. If the bell had been rung as the engine backed down on the car, would such ringing have given warning to the plaintiff of the approach of the engine?

"2. Was the bell upon the engine ringing when the engine was backing up on the side-track to the car on which the plaintiff was at work?

"3. Would the accident have happened if the bell on the engine had been ringing as the engine backed up against the flat-car?

"4. Was the accident caused by the failure of the plaintiff to heed the warning of the bell ringing?

"5. At the time when the plaintiff turned and saw the engine coming, and tried to make himself safe, as he testifies, was the danger imminent?"

The court submitted the second, fourth, and fifth of these questions to the jury, and refused the others. To the second, the jury answered, "No"; to the fourth, they said it was disposed of by their answer to the second; and to the fifth, answered, "No."

The principal questions argued here are grouped by counsel for defendant under the four following heads:—

1. If Light's negligence was the cause of the injury, was Light, in doing this work, the fellow-servant of plaintiff?

2. If he was not, then was his negligence the proximate

cause of the accident? or was such proximate cause the neglect of the engineer or fireman to ring the engine bell?

3. Whether appellant was entitled to have the two special questions 1 and 3 submitted.

4. Was the special verdict inconsistent with the general verdict?

No exceptions were taken to the admission or exclusion of evidence during the trial of the cause, and no complaint is made of the charge as given.

The principal contention is, that the plaintiff and Light were fellow-servants, and therefore the defendant company could not be held liable for the negligence of Light, even if, through his negligence, the plaintiff received his injuries. It is too well settled in this state to need the citation of authorities that the master is not liable for injuries personally suffered by his servant through the negligence of a fellow-servant acting as such while engaged in the common employment, unless the master is chargeable with negligence in the selection of the servant in fault, or in retaining him after notice of his incompetency. It is not contended in the present case that Mr. Light was incompetent for the position held by him as assistant road-master, but the claim of recovery is based upon the ground that he was not a fellow-servant of plaintiff. Neither is there any serious contention that the work being performed by the plaintiff was in itself dangerous. The rule, therefore, that the master is bound to provide a safe place in which to work, or suitable tools and materials to work with, has no application to this case.

The fact that the plaintiff was ordered by Light to load the poles upon the car, and to go upon the car to level them, and his having done so in obedience to the order, was not putting him in a place of danger by the assistant road-master. The injuries which he received did not grow out of the work he was ordered to do, either from the work being dangerous in character, or the place in which he was working dangerous. Neither was he injured by reason of any defect in machinery, tool, or other appliance he was called upon to use. There are many cases in this state holding that when a superior servant orders one under him to perform work differing from that for which he is employed, the superior is guilty of an abuse of authority, and the master held liable. But in the present case the work being done was in the ordinary line of the duty

of the section-gang. The ordinary duty is to keep the road-bed in repair, but they are often called upon to load ties, poles, and other materials upon the flat-cars, and to unload cars; and they must be held to assume the risk incident to such employment.

The injury resulted either from the negligence of Light, in ordering the plaintiff to continue the work while the engine was backing down upon the car, and telling him there was plenty of time, thus throwing him off his guard, and leading him to believe that Light would take care that the engine did not strike the car, or it resulted from the negligence of the engineer or fireman in not ringing the bell, which, if it had been rung, might have given the plaintiff warning of the approach of the engine, so that he could have steadied himself as it struck the car, and thus saved himself from being thrown off, or it was the result of the plaintiff's own carelessness.

If the injury grew out of the negligence of the engineer or fireman in not ringing the bell,—if that was the immediate and proximate cause of the injury,—the plaintiff would have no right of recovery, as the law is well settled in this state that the engineer and fireman, under such circumstances, are the fellow-servants of the plaintiff. It therefore became a material fact in the case for the determination of the jury whether the failure of the engineer or fireman to ring the bell was the proximate cause of the injury; and the court was in error in not permitting the jury to pass upon the special questions 1 and 3 presented. The jury found that “the bell was not ringing when the engine was backing up on the side-track to the car on which the plaintiff was at work.”

The plaintiff testified that if he had heard the bell ringing, he would have looked around, and prepared himself for the shock. The answer to these special questions—“If the bell had been rung as the engine backed down on the car, would such ringing have given warning to the plaintiff of the approach of the engine?” and “Would the accident have happened if the bell on the engine had been ringing as the engine backed up against the flat-car?”—might have shown that the jury found the injury was caused by the negligence of the engineer or fireman, and that the proximate cause of the injury was their negligence. Counsel for plaintiff contend that these did not submit questions of fact, but possible contingencies, if certain facts which did not exist had existed, and were therefore not proper questions for submission to the jury.

They were something beyond mere possibilities, under the testimony of the plaintiff himself. He was a railroad man.— had been engaged in that service for a series of years; and he knew, as he testifies, that the ringing of a bell on an engine is evidence that the engine is about to move or is moving; and even people who are not versed in the rules of railroad companies generally understand this fact. Therefore, according to this testimony, if the bell had been ringing he would have prepared himself for the shock; and the jury might have found, if the question had been submitted to them, that the accident would not have happened if the bell had been rung. This finding would, in effect, have been that the accident happened through the negligence of the engineer or fireman, and not through the fault of Light; for even if Light gave the order to plaintiff to continue his work, and by such order indicated that the engine would be kept from backing down, yet, if plaintiff knew or believed, notwithstanding Light's assurances, that the engine was actually coming, and would strike the car and place him in peril, very naturally he would have tried to save himself.

There is no evidence that Light had control of the engine, or that the engineer was not in full and complete charge of her. Evidently, the station agent, at the request of Light, gave the order to the engineer to uncouple from his train, and have the flat-car upon which the plaintiff was working moved forward to the other pile of poles. When the engine had backed down to the switch, the forward brakeman of the freight train opened the switch, and then ran back to the car to make the coupling, at the same time giving the engineer the signals to back down. This evidence shows that Light had nothing to do with making the coupling or giving the signals. While he stood near there, and, as plaintiff testifies, between the engine and flat-car, near the track, there is no evidence in the case that he had, or attempted to exercise, any control over the engineer in the manner of backing the engine down, or made any signals to stop or start. It was therefore an important element in the case for the jury to determine, under all the circumstances, and especially under the testimony of the plaintiff himself, whether the failure to ring the bell, if it was not rung, was the proximate cause of the injury; and the court should have submitted the special questions.

The court was also in error in refusing to give the defendant's fifth and seventh requests to charge. If, as stated in the

fifth request, Light did give the order to the plaintiff as he claims, but at that time Light did not know of the near approach of the engine, and the plaintiff did know of its approach, and failed to notify Light, or to save himself, he was guilty of contributory negligence. If such facts existed, the plaintiff must have apprehended a danger which was not apparent to Light. The evidence is somewhat conflicting as to whether the engine came to a stop after it approached or crossed over the switch, but Light testifies that he saw and heard nothing of its approach; that his back was turned partly towards the engine, and he was giving his attention to the men loading the poles. Plaintiff would have no right to recover damages for the negligence of Light, if he was aware of a danger which Light did not apprehend and being aware of it, did not seek to save himself from injury; and the fact that Light ordered him to go on with the work would not justify him to do so, in the face of danger which was apparent to him. This was covered by the seventh request, which should have been given.

The other requests, as framed and presented to the court, were properly refused. The first request to charge presents the most important question in the case. It assumes that Light is a fellow-servant of the plaintiff, and therefore no recovery could be had, even if his negligence was the proximate cause of the injury. Under the circumstances of this case, was he a fellow-servant, or a representative of the defendant company standing in the position of a superior servant or agent for whose negligence defendant company is to be held liable? If Light, in this position as a superior servant, represented the defendant company, and the plaintiff, relying upon the statement of Light that he had lots of time, went to work again under the belief that Light would not let the engine back against the car until the poles had been leveled off, and Light knew that the engine was backing up, or was in a position where he would have known it if he had exercised ordinary care, and gave the plaintiff no warning of its approach, and plaintiff did not know of its approach, the negligence of Light in permitting the engine to back up, and failure to give such warning, would be the negligence of the defendant company, for which the plaintiff would be entitled to recover, if this, and not the engineer's or fireman's negligence in failing to ring the bell, was the proximate cause of the injury. Under such circumstances, the servant's depend-

ent and inferior position is to be taken into consideration; and if the peculiar risk commanded by the master is not obvious, the servant has the right to assume that he is not being put in peril, and is not bound to investigate into the risk before obeying his orders. He is not called upon to set up his own judgment against his superiors; and he may rely upon their advice, and still more upon their orders, notwithstanding many misgivings of his own. And it is a general rule that if the master directs the servant to do some act which is even dangerous, but which could be made safe by special care upon the part of the master, the servant has the right to assume that such special care will be taken; and failing to exercise such care, the master is held liable.

- The jury found that at the time when plaintiff turned and saw the engine coming, and tried to make himself safe, as he testifies, the danger was not imminent; and from the issues submitted to them under the charge of the court, they also found that Light not only told the plaintiff there was lots of time, but that he negligently permitted the engine to be backed against the car.

The management of the affairs of a railroad company is vested in its board of directors, and such powers as Doyle or Light possessed and exercised were such only as were delegated by the directors under the rules of the company. So far as the corporate directors are concerned, no question can be made that for all purposes they represent the corporation, and their acts as a board are the acts of the principal; but in the management of its affairs, certain powers are and must be delegated to agents or servants who are clothed with certain discretionary powers. If the master places the entire charge of his business, or a distinct branch of it, wholly in the hands of an agent, exercising no discretion and no oversight, the neglect of the agent of the ordinary care in the exercise of the business of the master thus intrusted to him is a breach of duty for which the master is held liable.

Just what relation this superior servant bears to other servants it is often difficult to determine in a given case. The solution of the question must depend largely upon the power delegated to the superior servant, the exercise of such power, and his command and authority over those acting under him. The reciprocal rights and duties of such servants, and the liability of the master, are nowhere defined, except by adjudications of the courts; and in some of the states the duty and

liability of the master is pushed much further than in others by these adjudications.

In this state, in 1862, in the case of *Michigan Cent. R. R. Co. v. Leahey*, 10 Mich. 199, the general doctrine was laid down that the master is not liable to a servant for the neglect of his fellow-servant in doing or omitting to do their portion of the common work. This rule has been followed and approved in numerous cases, which have been so often cited that a repetition is unnecessary. This rule grew out of the English doctrine laid down in *Priestley v. Fowler*, 3 Mees. & W. 1, in 1837, and which has since been adhered to in England. The Massachusetts court, in *Farwell v. Boston etc. R. R. Corp.*, 4 Met. 49, 38 Am. Dec. 339 (decided in 1842), adopted the rule of the English courts. Other states followed this rule, until it has become the general doctrine in all the American states. The reason of this rule, as held by the Massachusetts courts in the early case above cited, is, that "where several persons are employed in the conduct of one common enterprise or undertaking, and the safety of each depends much on the care and skill with which each other shall perform his appropriate duty, each is an observer of the conduct of the others, can give notice of any misconduct, incapacity, or neglect of duty, and leave the service if the common employer will not take such precautions and employ such agents as the safety of the whole party may require. By these means the safety of each will be much more effectually secured than could be done by a resort to the common employer for indemnity in case of loss by the negligence of each other. Regarding it in this light, it is the ordinary case of one sustaining an injury, in the course of his own employment, in which he must bear the loss himself, or seek his remedy, if he have any, against the actual wrong-doer."

The rule thus adopted did not, however, relieve the master from a duty and obligation to his servants, whether the master be a natural person or a corporation, to furnish safe machinery or other apparatus, and to observe all the care which the exigencies of the situation reasonably required, as well as to employ competent servants. It is the duty of the master, also, to make such regulations or provisions for the safety of employees as will afford them reasonable protection against the dangers incident to the performance of their respective duties. This duty extends to the selection of competent persons to whom the master may delegate his author-

ity, to take charge of and control the business in which the servants are employed. There is no diversity of opinion upon these propositions. The difficulties arise when courts are called upon to determine who are and who are not fellow-servants in a given case, and this difficulty is made apparent when we note the hundreds of cases which in the last few years have found their way to the courts of last resort in the different states of the Union. The courts are not in harmony upon this question.

In Massachusetts, it is said that this rule "is not confined to the case of two servants working in company, or having opportunity to control or influence the conduct of each other, but extends to every case in which the two, deriving their authority and compensation from the same source, are engaged in the same business, though in different departments of duty; . . . and it makes no difference that the servant whose negligence causes the injury is a submanager or foreman of higher grade or greater authority than the plaintiff": *Holden v. Fitchburg R. R. Co.*, 129 Mass. 268; 37 Am. Rep. 348; 7 Am. & Eng. Ency. of Law, 835.

This rule is substantially followed in Maine, though it is said that an exception to the rule exists if the master has delegated to the foreman or superintendent the care and management of the entire business, or a distinct department of it; the situation being such that the superior servant is charged with the performance of duties towards the inferior servant which the law imposes upon the master.

The rule is ably discussed by Chief Justice Church in *Flicks v. Boston etc. R. R. Co.*, 53 N. Y. 553, 13 Am. Rep. 545, where he says: "The true rule, I apprehend, is to hold the corporation liable for negligence or want of proper care in respect to such acts and duties as it is required to perform and discharge as master or principal, without regard to the rank or title of the agent intrusted with their performance. As to such acts, the agent occupies the place of the corporation, and the latter should be deemed present, and consequently liable for the manner in which they are performed. If an agent employs unfit servants, his fault is that of the corporation, because it occurred in the performance of the principal's duty, although only an agent himself. So in providing machinery or materials, and in the general arrangement and management of the business, he is in the discharge of the duty pertaining to the principal."

In *Malone v. Hathaway*, 64 N. Y. 5, 21 Am. Rep. 573, Mr. Justice Allen makes the distinction between natural and artificial persons, and lays down the rule that it is only where the master withdraws from the management of the business, intrusting it to a middleman or superior servant, or where, as in the case of a corporation, the business is of such a nature that the general management and control thereof is necessarily committed to agents, that the master can be held liable to a subordinate for the negligent acts of one thus placed in his stead. Under this rule, a foreman who had no delegation of power or control, but who was merely charged with special duties, was held to be a fellow-servant: 7 Am. & Eng. Ency. of Law, 834. Mr. Wharton, in his work on negligence, section 229, says this doctrine is in harmony with the American cases.

As before stated, it is difficult to lay down any general rule which shall determine all cases. In some of the states, it is undoubtedly true that the master is held to a much stricter accountability and responsibility for the acts and emissions of those who are classed by some of the other courts as fellow-servants; and the tendency of modern adjudications is more and more to relax the rule that those who are engaged in the same common enterprise or business are fellow-servants, especially if it can be pointed out that the one in fault occupies some higher grade or more power than the party injured. Especially is this the case where parties are servants of corporations. If parties are fellow-servants while engaged in the business of a natural person, the same rule and reasoning, under like circumstances, ought to place them in the same category while engaged in the business of a corporation; and if one is the agent or superior servant while engaged in the business of a corporation, and through whose negligent conduct another engaged in the same common enterprise is injured, and for whose injuries the corporation is held liable, then, under like circumstances, if it was the business of a natural person, the master should be so held. Some general rules may, however, be laid down which in many instances may serve as a guide in the determination of the question. It is not to be determined solely from the grade or rank of the offending or injured servant, but it is to be determined by the character of the act being performed by the offending servant. If it is an act that the law imposes the duty upon the part of the master to perform, then the offending employee is not a fellow-servant,

but a superior or agent, for whose acts the master is held liable.

Again, if the master has delegated to a servant or employee the care and management of the entire business, or a distinct department of it, the situation being such that the superior servant is charged with the performance of duties towards the inferior servant, which the law imposes upon the master, then such superior servant stands in the place of the master, and the rule of *respondet superior* applies. Whether or not the servant has power to employ and discharge other servants is also important in determining whether or not he is deemed to be a superior servant, for whose acts the master is held liable: *Chapman v. Erie R'y Co.*, 55 N. Y. 579; *Kansas Pac. R'y Co. v. Salmon*, 11 Kan. 83.

When the offending servant, having general power and authority to employ and discharge servants, and having authority to direct and control the injured servant, orders him to do an act not within the scope of the injured servant's employment, whereby he is exposed to danger not contemplated in his contract of service, and he is injured in so doing, or where the master has charged a servant or employee with the sole duty of providing proper materials and appliances for carrying on the work in which he is personally engaged, and a servant is injured by his neglect so to do, the master is held liable to the injured servant while acting under the orders of the superior servant: *Gilmore v. Northern Pac. R'y Co.*, 18 Fed. Rep. 866.

These rules are in line with the remarks of Mr. Justice Cooley in *Quincy Mining Co. v. Kitts*, 42 Mich. 39, though the learned justice, in finally deciding the case, held that Wagner did not stand, in respect to the company, in such position. It was, however, remarked by him that "when a servant demands from his master compensation for an injury received in his service, it is necessary that he trace some distinct fault to the master himself. The mere fact of such injury is no evidence of such fault; neither is the mere fact that it resulted from the carelessness of some other person in the same employment. The servant assumes all the usual risks of his employment, and among these is the risk that fellow-servants will sometimes be careless, and that injuries will result. All that can be required of the master in that regard is, that his servants shall be prudently chosen, and that they shall not be retained in his service after unfitness or negligence has been discovered, and has been communicated to him. This

duty of due care in the employment and retention of competent servants is one the master cannot relieve himself of by any delegation; and if it becomes necessary to intrust its performance to a general manager, foreman, or superintendent, such officer, whatever he may be called, must stand in the place of his principal, and the latter must assume the risk of his negligence. The same is true of the general supervision of his business. If there is negligence in this, the master is responsible for it, whether the supervision be by the master in person, or by some manager, superintendent, or foreman to whom he delegates it. In other words, while the servant assumes the risk of the negligence of fellow-servants, he does not assume the risk of negligence in the master himself, or in any one to whom the master may see fit to intrust his superintending authority." In support of this doctrine the following cases are cited: *Albro v. Agawam Canal Co.*, 6 Cush. 75; *McAndrews v. Burns*, 39 N. J. L. 117; *Malone v. Hathaway*, 64 N. Y. 9; *Hard v. Vermont etc. R. R. Co.*, 32 Vt. 473.

In *Ryan v. Bagaley*, 50 Mich. 179, it appeared that the defendant resided at Pittsburgh, and was proprietor of the Palmer Iron Mines. Decedent, while working as a laborer in the mine, was killed. The defense was, that the casualty was owing to the negligence of Whitesides, who was a fellow-servant. It appeared that Kirkpatrick was the agent of defendant first in station. He knew nothing of the business, and appointed Whitesides as mining captain, and with whom the defendant, on his visits to the mine, consulted. Upon the question whether Whitesides was the fellow-servant of the deceased, the circuit judge charged the jury: "Now, what was the position of Captain Whitesides? He was a mining captain. I think it appears, from the testimony, that he had the entire charge and control of the underground work, and all the work generally of the mine, and he employed and discharged men. Now, I charge you that Captain Whitesides, if he had this power delegated to him,—to manage and control the mine,—negligence on his part would be the negligence of the owners or managers of the mine."

This court, in considering that part of the charge, say: "Under this charge, and in view of all the facts, it was settled by the jury that Whitesides's position and power were as indicated by the judge. We are consequently to consider that he was intrusted with the management of the mine, without direction or interference. He was not, in any true

sense, a mere foreman, or department leader, or subchief, in a given sphere of the mining operations. His agency covered the entire mine, and his capacity and discretion dominated. The defendant and the agent, Kirkpatrick, equally regarded him and looked to him as the one person to contrive and execute; and they were guided by his intelligence, not he by theirs. In respect to legal accountability, his negligence was the negligence of the defendant. The case is within the principle stated and recognized in *Quincy Mining Co. v. Killa*, 42 Mich. 34."

Many cases have been presented to this court involving the questions as to who were and who were not fellow-servants, but in no instance has the question been presented under circumstances exactly like the present case; so that we must determine it upon its own peculiar facts, being guided by the rules here laid down. Applying, therefore, the foregoing rules, so far as the same can be made applicable to this case, is Light to be treated as a superior servant, for whose negligence, if any is shown, the defendant company can be held liable? He had general charge of the entire length of about 150 miles of defendant's road, and had under his control all the section-gangs along that line; and there is nothing in the record showing that Doyle, the general road-master, in any way interfered with him in the manner in which the work of that division was being conducted. He in fact controlled that entire division absolutely, so far as employing and discharging the men was concerned. The order came from Doyle to remove these poles, because they were to be taken to another division or branch of the same road. Doyle was not present at the time of the injury, and the fair inference is, that whatever power Doyle would have had, if present, Light had like power, and represented the defendant company as fully as Doyle would have done. He did no manual labor himself, but had the full oversight, care, and management of it. It is apparent that the business of the railroad could not be carried forward without this division of labor and responsibility. It was necessary that these heads of departments and divisions should be made, and power delegated to each head. Under such circumstances, and well-settled rules of law, it must be held that Light represented the company; and for his negligence, while in the line of the duties so assigned and delegated to him, the company must be held responsible.

It is evident that the plaintiff and the other section-hands there looked upon Light as the responsible head, from whom they received their orders, and whom they were bound to obey, or else they would receive their "red tickets," or discharges from their employment. Any other rule than this would enable the master to escape all liability, by parceling out his work to different heads of departments or divisions, and retiring from any management or control of it; and the more he abandoned it to others, — the more he neglected it, — the less would he be liable. When the master appoints a middleman with such powers as were delegated to Light in this case, or where the business is of such a nature that it is necessarily committed to agents, with full power to employ and discharge those acting under them, and with full and absolute control of the work, the principal is liable. The master is in a position to select such middlemen and agents with care, and in regard to their fitness for the place, and is responsible for their negligence: *Laning v. New York Cent. R. R. Co.*, 49 N. Y. 521; 10 Am. Rep. 417; *Malone v. Hathaway*, 64 N. Y. 9.

For the errors pointed out, the judgment below must be set aside, with costs, and a new trial granted.

MASTER AND SERVANT — VICE-PRINCIPAL. — As to when and under what circumstances one will be considered as a vice-principal, and not a fellow-servant, see *Taylor v. Evansville etc. R. R. Co.*, 121 Ind. 124; 16 Am. St. Rep. 372, and note; *Louisville etc. R'y Co. v. Graham*, 124 Ind. 89; *Van Dusen v. Letellier*, 78 Mich. 492; *Brown v. Gluckrist*, 80 Mich. 56; *Missouri P. R'y Co. v. Williams*, 75 Tex. 4.

MASTER AND SERVANT. — WHO ARE FELLOW-SERVANTS, AND WHO ARE NOT: See note to *Fisk v. Central Pac. R. R. Co.*, 1 Am. St. Rep. 31-33; *Taylor v. Evansville etc. R. R. Co.*, 121 Ind. 124; 16 Am. St. Rep. 372, and note. A road-master and a section-hand are fellow-servants: *Galveston etc. R'y Co. v. Smith*, 76 Tex. 611; 18 Am. St. Rep. 78, and note; *Brown v. Winona etc. R. R. Co.*, 27 Minn. 162; 28 Am. Rep. 285; and so is an engineer and a section-hand: *Blake v. Railroad Co.*, 70 Me. 60; 35 Am. Rep. 297.

LIABILITY OF MASTER FOR INJURIES RECEIVED THROUGH FELLOW-SERVANT'S NEGLIGENCE. — A master is not liable to a servant for injuries received through the negligence of a fellow-servant engaged in a common employment: *Hess v. Michigan C. R'y Co.*, 78 Mich. 513, cited at length in the note to *Adams v. Iron Cliffs Co.*, 18 Am. St. Rep. 455 et seq.; unless the master negligently employs an incompetent servant, through whose negligence or incompetency his fellow-servant receives injuries: *Kear v. Detroit Copper etc. Mills*, 66 Mich. 277; 11 Am. St. Rep. 492; *McMaster v. Illinois C. R. R. Co.*, 65 Miss. 264; 7 Am. St. Rep. 658; *Evansville etc. R. R. Co. v. Guyton*, 115 Ind. 450; 7 Am. St. Rep. 458, and note; note to *Petersen v. Chicago etc. R'y Co.*, 11 Am. St. Rep. 670.

MASTER AND SERVANT—VICE-PRINCIPAL.—Master is answerable to under-servants for the negligence of superior servants acting within the scope of their employment, and who are given control and management of a part of the work in which their duty is that of superintendence: *Denver etc. R. R. Co. v. Driecoll*, 12 Col. 520; 13 Am. St. Rep. 243; *Slater v. Chapman*, 67 Mich. 523; 11 Am. St. Rep. 593, and note; *Louisville etc. R. R. Co. v. Lahr*, 86 Tenn. 335; *Taylor v. Evansville etc. R. R. Co.*, 121 Ind. 124; 16 Am. St. Rep. 372, and note; *Missouri P. R'y Co. v. Williams*, 75 Tex. 4; 16 Am. St. Rep. 867. But a master is not liable in such a case unless the superior servant stands with respect to the injured servant as the master's representative: *Wilson v. Dunreath etc. Co.*, 77 Iowa, 429; 14 Am. St. Rep. 304.

MASTER AND SERVANT—MASTER'S DUTY.—A servant may act upon the presumption that the master will not expose him to any unnecessary risk. He must know and avoid patent dangers, but not latent ones; yet he may be precluded from recovering for injuries received from latent dangers, if he actually knew of their existence and their dangerous character: *Myhan v. Louisiana Electric etc. Co.*, 41 La. Ann. 964; 17 Am. St. Rep. 436. But knowledge by a servant of the unsafe condition of an appliance does not defeat recovery, if it was not so dangerous as to threaten immediate injury, or if he might reasonably be supposed to work safely on it by the use of care and caution: *Soeder v. St. Louis etc. R'y Co.*, 100 Mo. 673; 18 Am. St. Rep. 724.

HORTON v. HOWARD.

[79 MICHIGAN, 6-12.]

JUDGMENT BY DISQUALIFIED JUDGE, EFFECT OF.—A judgment or decree rendered by a judge who by statute is disqualified to sit in the case because of his relationship to one of the parties is void, and may be collaterally attacked.

JUDGMENT BY DISQUALIFIED JUDGE, WHO MAY ATTACK.—A party against whom a judgment or decree has been rendered by a judge disqualified to sit in the case because of his relationship to one of the parties, and who has neither appeared nor consented to the exercise of judicial functions by the disqualified judge, is not estopped from questioning its validity in a collateral proceeding. He need not contest its validity by appealing from the decree.

JUDGMENT BY DISQUALIFIED JUDGE, WHO MAY ATTACK.—The grantee of a purchaser under a foreclosure decree void by reason of the disqualification of the judge on account of his relationship to one of the parties to the suit at the time that the decree was rendered and the deed signed by such judge, but who does not rely upon the title thus acquired, and who is also the grantee of subsequent purchasers at foreclosure sales of the same property, is not estopped from collaterally attacking the validity of such decree.

Chadwick and Wood, for the appellant.

Atkinson, Vance, and Wolcott, and H. W. Stevens, for the respondents.

CHAMPLIN, C. J. The plaintiff brings ejectment. The parties claim title from a common source.

The plaintiff claims title to an undivided one eighth of certain premises through a deed executed on a foreclosure of a mortgage upon the premises in question, pursuant to a decree of the circuit court for the county of St. Clair, in chancery. In this suit for foreclosure, the complainants were Rebecca Horton, Carlos D. Horton, and Etta M. Beard; and John Hibbard, William B. Hibbard, and others were defendants. The bill was taken as confessed against the Hibbards for want of appearance. The circuit court was presided over and the final decree signed by Hon. Edward W. Harris, circuit judge.

The claim is now made that the decree is void on account of the relationship of the circuit judge to the complainants in the cause, which was as follows: The wife of Judge Harris was, at the time the decree was signed, a niece of Rebecca Horton. Said Rebecca Horton and the father of Judge Harris's wife were sister and brother. The judge was cousin by marriage of said Carlos D. Horton and Etta M. Beard, who were children of Rebecca Horton. Such relationship was known to said parties at the time of rendition of the decree.

Howell's Statutes, section 7245, enacts: "No judge of any court can sit as such in any cause in which he is a party, or in which he is interested, or in which he would be excluded from being a juror by reason of consanguinity or affinity to either of the parties."

This statute, mandatory in its terms, voices the universal sentiment of mankind excluding judges from sitting in cases where they are parties or are interested. It extends and applies the prohibition of the common law relative to jurors sitting in cases of kinship or affinity by marriage to judges, and disqualifies them within the prohibited degrees, which, at the common law, have been held to extend to the ninth. It will not be necessary, under the record in this case, to discuss the exceptions which some courts hold to exist from necessity. The circuit judge was a nephew by marriage of one of the complainants, and a cousin of the other two, and was disqualified from sitting in the cause, or signing a decree therein.

The next question is, whether the decree is void or merely voidable. No judge can sit in his own cause. Should he do so, a decree rendered by him in his own favor would be

utterly void. If he cannot sit, his seat, in a judicial sense, is vacant, and his acts are without judicial sanction. The inhibition of the statute is the same where he is related to a party to a cause, and the result is the same. The authorities are numerous and nearly uniform which hold that a judgment or decree rendered by a judge contrary to a statute like ours is void, and may be attacked collaterally: *Foot v. Morgan*, 1 Hill, 654; *Oakley v. Aspinwall*, 3 N. Y. 547; *Estate of White*, 37 Cal. 192; *Chambers v. Hodges*, 23 Tex. 104; *Fechheimer v. Washington*, 77 Ind. 366; *Hall v. Thayer*, 105 Mass. 219; 7 Am. Rep. 518; *In re Ryers*, 72 N. Y. 1; 28 Am. Rep. 88; *In re Dodge etc. Mfg. Co.*, 77 N. Y. 101; 33 Am. Rep. 579; *Peninsular R'y Co. v. Howard*, 20 Mich. 25; *Stockwell v. Township Board*, 22 Mich. 349; *Shannon v. Smith*, 31 Mich. 452; *West v. Wheeler*, 49 Mich. 505.

Nothing can be claimed by way of estoppel where the party against whom the judgment has been rendered or decree pronounced has neither appeared nor consented to the exercise of judicial functions by the disqualified judge.

Neither was the decree validated by the incidental mention of the rights of the parties to the mortgage foreclosed in the case of *Pool v. Horton*, 45 Mich. 404. It is true that the opinion states the fact of the foreclosure of the mortgage by Rebecca Horton, Carlos D. Horton, and Etta M. Beard, but the validity of that foreclosure was not in issue, and the priority of their rights was not made to depend upon the foreclosure, but upon the date of their mortgage, and their equitable rights under it.

It appears from the findings of fact that a sale was made under the foreclosure decree questioned here, on July 21, 1879, and the premises, being an undivided one-fourth part, were bid in by the complainants, Rebecca Horton and Etta M. Beard, and conveyed to them jointly by commissioner's deed; and it further appears that defendant Howard became a purchaser at foreclosure sales of two other mortgages, covering the property in dispute, but both of which were subject to the mortgage under which the plaintiff claims. He also purchased of the First National Bank its claim acquired through a foreclosure sale upon a mortgage which was also subsequent and subject to the mortgage under which plaintiff claims. The defendant made his first purchase under the sale upon the Pool mortgage on May 13, 1881, and before making the other purchases; and on October 4,

1881, he purchased from Etta M. Beard an undivided one eighth of the premises in question. The only claim that Etta M. Beard had to the premises was that arising out of the mortgage before spoken of, and the proceedings to foreclose it, and in which the decree of foreclosure is attacked.

It is claimed by the plaintiff's counsel that by purchasing the interest conveyed to Etta M. Beard by the commissioner's deed of date July 21, 1879, the defendant has assented to its validity, and cannot now be heard to question its binding force. But it does not appear that he has ever asserted any rights under this purchase, relying upon the validity of the deed from Etta M. Beard. On the contrary, he does not appear to have considered it of any efficacy, for, after such purchase, the record shows that he purchased from the bank and from Smith these same premises obtained by them upon foreclosure of subsequent mortgages, and which he need not have done if the decree under which Etta M. Beard obtained her deed was valid. I do not think, in view of all the facts, that this purchase from Etta M. Beard, and receiving a deed from her, estops him from questioning the validity of the decree.

The defendant entered into possession of the land in controversy in 1879, under an agreement with the bank, which held a deed given on foreclosure, dated June 14, 1879, and has continued in possession since, and his possession and claim of title has been open and hostile to the claim of plaintiff ever since; so that it cannot be said that he is chargeable with delay in asserting the invalidity of the plaintiff's claim. If any laches is imputable, it is to the plaintiff, rather than the defendants.

It is furthermore urged that the remedy of the defendants was by appeal, and to have raised and contested the question of the validity of the decree in the appellate court. But the decree in the court below was taken upon the matter of the bill as confessed for want of an appearance. The defendants could not be presumed to know that a decree could be entered against them by a judge disqualified on the ground of kinship or affinity. And as the record does not disclose the fact, it is not quite clear how the question could be raised upon the record upon appeal.

But the objection reaches further than the mere rights of parties to the suit. It involves the administration of justice before unprejudiced and impartial tribunals whose judicial

acts the public are interested in placing above the plane of criticism or reproach. If a decree of an inferior court may be sustained because an appeal will lie, what shall be done when a decree of a court of last resort is passed and entered by judges interested or related to the parties? It cannot be corrected by appeal. The statute applies to all judges and to all courts, and renders their acts *coram non judice*.

In *Peninsular Ry Co. v. Howard*, 20 Mich. 25, it was said: "It is not a matter of discretion with the judge or other person acting in a judicial capacity, nor is it left to his own sense of propriety or decency; but the principle forbids him to act in such capacity at all when he is thus interested, or when he may possibly be subjected to the temptation. His powers are absolutely subject to this limitation."

And in *Stockwell v. Township Board*, 22 Mich. 350, it was said: "The immediate rights of the litigants are not the only objects of the rule. A sound public policy, which is interested in preserving every tribunal appointed by law from discredit, imperiously demands its observance."

The judgment of the circuit court must be affirmed.

JUDGMENT BY DISQUALIFIED JUDGE. — As to the validity and effect of a judgment rendered by a disqualified judge, see extended note to *Moses v. Julian*, 84 Am. Dec. 128-133. In *Frewert v. Swift*, 19 Nev. 363, it is decided that the acts of a disqualified judge involving judicial discretion are void.

CASES
IN THE
SUPREME COURT
OF
MINNESOTA.

MORIARTY v. ASHWORTH.

[48 MINNESOTA, 1.]

WASTE BY MORTGAGOR IN POSSESSION OF REAL ESTATE WILL NOT BE ENJOINED, unless the acts complained of are such as may render the security insufficient for the satisfaction of the debt, or of doubtful sufficiency. The mortgagee is, however, entitled to have the mortgaged property preserved as sufficient security for the payment of his debt, and it is not enough that its value may be barely equal to the debt.

INJUNCTION. The opinion states the case.

Oscar Taylor, for the appellant.

Reynolds and Stewart, for the respondent.

DICKINSON, J. This is an action to restrain the defendant from quarrying and disposing of granite rock from land mortgaged by the defendant to the plaintiff, in April, 1887, to secure a debt of one thousand dollars, to become due two years after that time. The land is of the area of four acres. Its principal value is in the granite quarry thereon. The removal of this material depreciates the value of the land to the extent of such removal; but the quarrying by the defendant has not been carried on to such an extent as to so far impair the value of the land as to render it insufficient security for the plaintiff's debt, nor has he threatened to do so. The court, finding the facts to be substantially as above stated, considered that the plaintiff was not entitled to an injunction. On this appeal we are only to consider whether, upon the facts found, the legal conclusion of the court was right.

While some authority may be found in support of the claim

of the appellant that a mortgagee is entitled to an injunction restraining any acts of waste by a mortgagor in possession which may diminish the value of the mortgaged property, yet the great weight of authority, both in England and in this country, is to the effect that equity will not interfere in such cases unless the acts complained of are such as may render the security insufficient for the satisfaction of the debt, or of doubtful sufficiency: *King v. Smith*, 2 Hare, 239; *Humphreys v. Harrison*, 1 Jacob & W. 581; *Hippesley v. Spencer*, 5 Madd. 422; *Harper v. Aplin*, 54 L. T., N. S., 383; *Coker v. Whitlock*, 54 Ala. 180; *Scott v. Wharton*, 2 Hen. & M. 25; *Buckout v. Swift*, 27 Cal. 433; 87 Am. Dec. 90; *Vanderslice v. Knapp*, 20 Kan. 647; *Harris v. Bannon*, 78 Ky. 568; *Van Wyck v. Alliger*, 6 Barb. 507, 511; *Snell's Equity*, 304; 1 *Watson's Comp. Eq.* 746; 2 *Story's Eq. Jur.*, sec. 915; *High on Injunctions*, 2d ed., secs. 693, 694; *Bispham's Equity*, 4th ed., sec. 433; 1 *Jones on Mortgages*, 4th ed., sec. 684; 1 *Lead. Cas. Eq.*, 4th Am. ed., 992, 1021; *Kerr on Injunctions*, 2d Am. ed., 84. In numerous other cases we find that the courts, in stating the grounds upon which equity will interfere, seem to regard it as a necessary condition that the sufficiency of the security be threatened: See *Cooper v. Davis*, 15 Conn. 556; *Gray v. Baldwin*, 8 Blackf. 164; *Hastings v. Perry*, 20 Vt. 272; *Fairbank v. Cudworth*, 33 Wis. 358. From the proposition which we have stated as an established principle of equity, it is not to be understood that equity will not interfere unless the acts threatened are such as may reduce the value of the mortgaged property below the amount of the debt. On the contrary, as was considered in *King v. Smith*, 2 Hare, 239, we think that the mortgagee is entitled to be protected from acts of waste which would so far impair the value of the property as to render the security of doubtful sufficiency. He is entitled to have the mortgaged property preserved as sufficient security for the payment of his debt, and it is not enough that its value may be barely equal to the debt. That would not ordinarily be deemed sufficient as security to one whose purpose is to secure payment, and not to become a purchaser of the property at its market value. And not only must it be considered that the mortgage is held to secure payment of the debt, and not for the purpose of converting the mortgagee into a purchaser, but that if the debt is not yet mature it is to be considered whether, during the time which may elapse before maturity, the present value of the property may not become

depreciated from causes not now known. It does not appear that the court in this case failed to regard these considerations.

Judgment affirmed.

WASTE BY MORTGAGOR IN POSSESSION — INJUNCTION. — A vendee in possession, under an executory contract for the sale of land in which the vendor retains title, may be enjoined from committing waste, when the vendor shows that he has no security but the land, and that its value is thereby impaired: *Moses v. Johnson*, 88 Ala. 517; 16 Am. St. Rep. 58; and a vendor's position, when he has not conveyed title to the land sold, is similar to that of a mortgagee: *Salmon v. Hoffman*, 2 Cal. 138; 56 Am. Dec. 322, and note. Compare *Verner v. Betz*, 46 N. J. Eq. 256; *post*, p. 000, and note.

STENSGAARD v. SMITH.

[48 MINNESOTA, 11.]

MUTUALITY OF OBLIGATION ESSENTIAL TO BINDING CONTRACT. — An instrument signed by an owner of real estate and given to a real estate broker, declaring that in consideration of the latter's agreeing to act as agent for the sale of certain land the former thereby gave to the latter the exclusive right for three months to sell the same and promised to pay a stated commission for making a sale, is not a contract, because there is no mutuality of obligation, nor any other consideration for the agreement of the party who signed it, and so long as it remained a mere present authorization to sell, without contract obligations having been fixed, it was revocable by the party who signed it at any time before a sale was effected. The mere receiving of this instrument by the party to whom it was given did not import an agreement on his part to so act as agent, nor did the fact that he tried for a month to sell the land fix that obligation upon him; for such acts on his part are referable to the naked present power to sell, and proof of these facts is not sufficient to sustain an averment of a contract entered into.

ACTION to recover thirteen thousand dollars damages for breach of the alleged contract set forth in the opinion. The complaint alleged that immediately after the date of the contract the land described in it rapidly increased in value, and that within the period of three months designated in the contract the plaintiff could and would have sold it for thirty thousand dollars had not the defendant broken the contract by conveying the land to another. A verdict was directed for the defendant, a new trial was refused, and the plaintiff appealed. Other facts are stated in the opinion.

John W. Willis and Charles A. Willard, for the appellant.

Kueffner and Fauntleroy, for the respondent.

DICKINSON, J. This action is for the recovery of damages for breach of contract. The rulings of the court below, upon the trial, were based upon its conclusion that no contract was shown to have been entered into between these parties. We are called upon to review the case upon this point. The plaintiff was engaged in business as a real estate broker. On the 11th of December, 1886, he procured the defendant to execute the following instrument, which was mostly in printed form:—

“ST. PAUL, Dec. 11, 1886.

“In consideration of L. T. Stensgaard agreeing to act as agent for the sale of the property hereinafter mentioned, I have hereby given to said L. T. Stensgaard the exclusive sale, for three months from date, the following property, to wit [here follows a description of the property, the terms of sale, and some other provisions not necessary to be stated]. I further agree to pay said L. T. Stensgaard a commission of two and one half per cent on the first two thousand dollars, and two and one half per cent on the balance of the purchase price, for his services rendered in selling of the above-mentioned property, whether the title is accepted or not, and also whatever he may get or obtain for the sale of said property above seventeen thousand dollars for such property, if the property is sold.

JOHN SMITH.”

The evidence showed that the plaintiff immediately took steps to effect a sale of the land, posted notices upon it, published advertisements in newspapers, and individually solicited purchasers. About a month subsequent to the execution by the defendant of the above instrument, he himself sold the property. This constitutes the alleged breach of contract for which a recovery of damages is sought.

The court was justified in its conclusion that no contract was shown to have been entered into, and hence that no cause of action was established. The writing signed by the defendant did not of itself constitute a contract between these parties. In terms indicating that the instrument was intended to be at once operative, it conferred present authority on the plaintiff to sell the land, and included the promise of the defendant that if the plaintiff should sell the land, he should receive the stated compensation. This alone was no contract; for there was no mutuality of obligation, nor any other consideration for the agreement of the defendant. The plaintiff did not by this instrument obligate himself to do anything,

and therefore the other party was not bound: *Bailey v. Austrian*, 19 Minn. 465, 535; *Tarbox v. Gotsian*, 20 Minn. 122, 139. If, acting under the authority thus conferred, the plaintiff had, before its revocation, sold the land, such performance would have completed a contract, and the plaintiff would have earned the compensation promised by the defendant for such performance: *Andreas v. Holcombe*, 22 Minn. 339; *Ellsworth v. Southern Minn. Ry Extension Co.*, 31 Minn. 543. But so long as this remained a mere present authorization to sell, without contract obligations having been fixed, it was revocable by the defendant. The instrument does, it is true, commence with the words: "In consideration of L. T. Stensgaard agreeing to act as agent for the sale of the property," etc.; but no such agreement on the part of the plaintiff was shown on the trial to have been actually made, although it was incumbent upon him to establish the existence of a contract as the basis of his action. This instrument does not contain an agreement on the part of the plaintiff, for he is no party to its execution. It expresses no promise or agreement, except that of the defendant. It may be added that the language of the "consideration" clause is not such as naturally expresses the fact of an agreement having been already made on the part of the plaintiff. Of course, no consideration was necessary to support the present, but revocable, authorization to sell. It is difficult to give any practical effect to this clause in the construction of the instrument. It seems probable, in the absence of proof of such an agreement, that this clause had no reference to any actual agreement between these parties, but was a part of the printed matter which the plaintiff had prepared for use in his business, with the intention of making it effectual by his own signature. If he had appended to this instrument his agreement to accept the agency, or even if he had signed this instrument, this clause would have had an obvious meaning.

This instrument, executed only by the defendant, was effectual, as we have said, as a present, but revocable, grant of authority to sell. It involved, moreover, an offer on the part of the defendant to contract with the plaintiff that the latter should have, for the period of three months, the exclusive right to sell the land. This action is based upon the theory that such a contract was entered into; but to constitute such a contract, it was necessary that the plaintiff should in some way signify his acceptance of the offer, so as to place

himself under the reciprocal obligation to exert himself during the whole period named to effect a sale. No express agreement was shown. The mere receiving and retaining this instrument did not import an agreement thus to act for the period named, for the reason that whether the plaintiff should be willing to take upon himself that obligation or not, he might accept and act upon the revocable authority to sell expressed in the writing; and if he should succeed in effecting a sale before the power should be revoked, he would earn the commission specified. In other words, the instrument was presently effectual and of advantage to him, whether he chose to place himself under contract obligations or not.

For the same reason the fact that for a day or a month he availed himself of the right to sell conferred by the defendant, by attempting to make a sale, does not justify the inference, in an action where the burden is on the plaintiff to prove a contract, that he had accepted the offer of the defendant to conclude a contract covering the period of three months, so that he could not have discontinued his efforts without rendering himself liable in damages. In brief, it was in the power of the plaintiff either to convert the defendant's offer and authorization into a complete contract, or to act upon it as a naked revocable power, or to do nothing at all. He appears to have simply availed himself, for about a month, of the naked present right to sell if he could do so. He cannot now complain that the land-owner then revoked the authority, which was still unexecuted. It may be added that there was no attempt at the trial to show that the plaintiff notified the defendant that he was endeavoring to sell the land; and there is but little, if any, ground for an inference from the evidence that the defendant in fact knew it.

The case is distinguishable from those where, under a unilateral promise, there has been a performance by the other party, of services, or other thing to be done, for which, by the terms of the promise, compensation was to be made. Such was the case of *Geward v. Waters*, 98 Mass. 596, relied upon by the appellant as being strictly analogous to this case. In the case before us, compensation was to be paid only in case of a sale of the land by the plaintiff. He can recover nothing for what he did, unless there was a complete contract; in which case, of course, he might have recovered damages for its breach.

Order affirmed.

CONTRACTS — MUTUALITY. — As to the requisite mutuality of contracts, see note to *Benedict v. Lynch*, 7 Am. Dec. 492-494; *Eno v. Woodworth*, 4 N. Y. 249; 53 Am. Dec. 370, and note. There must be a mutual agreement of the parties, to constitute a valid and binding contract: *Pillsbury etc. Co. v. Black*, 42 La. Ann. 107.

CONTRACT — ACCEPTANCE. — In order to make an offer binding as a contract, it must be accepted by the other party, thereby making a mutual agreement: *Wardell v. Williams*, 62 Mich. 50.

HALL v. PILLSBURY.

[43 MINNESOTA, 32.]

COMMINGLED GRAIN IN WAREHOUSE, TITLE TO, IN DEPOSITOR. — The delivery of grain for storage in a warehouse is a bailment, under the Minnesota statute, and the title thereto remains in the depositor, who is deemed to be the owner of grain in the warehouse to the amount of his deposit, although the identical grain that he deposited may have been removed, and other grain of like kind and quality substituted in its stead.

HOLDERS OF GRAIN-RECEIPTS, TENANTS IN COMMON. — The holders of receipts for grain of the same kind and quality deposited in a warehouse are tenants in common of the mass of grain of that kind and quality in the warehouse, the interest of each being limited to the amount called for by his receipt; and where the warehouseman puts his own grain in the warehouse, he becomes a tenant in common with the other depositors, his interest in the mass being limited to the excess above what is necessary to meet his outstanding receipts.

SALE OF GRAIN BY WAREHOUSEMAN, WHEN CONVERSION. — If a warehouseman sells as his own, grain beyond the amount of the excess above that necessary to meet his outstanding receipts, without express consent of the depositors in his warehouse, his sale passes no title, and the owners may follow the grain into the hands of the purchaser, and recover of him for a conversion.

CONVERSION. The opinion states the case.

Ralph Whelan, for the appellants.

B. S. Lewis, for the respondent.

GILFILLAN, C. J. Appeal from an order overruling a demurrer to the complaint. From the complaint it appears, in brief, that the firm of G. W. Ehle & Co. operated and conducted, for the storage of grain, a grain warehouse at Stewart, in this state. Fifteen different owners of grain, plaintiff being one of them, deposited at different times with said Ehle & Co., in said warehouse, for storage, different quantities of wheat, the aggregate amount so deposited being 2,647 $\frac{3}{4}$ bushels, and upon each of such deposits each depositor received from Ehle & Co. the usual warehouse or elevator receipt for the amount

so deposited, with, however, this clause (unusual, we think), that if, for any reason, it should become necessary to remove such grain, Ehle & Co. reserved the right to deliver the grain from any other warehouse operated by them, etc. As the mere desire on the part of Ehle & Co. to sell the grain so deposited could not be regarded as a reason for removal under this clause, and no reason of necessity for its removal appears, we need not further consider that clause. None of the receipts so issued were redeemed. Ehle & Co., without the knowledge or consent of the receipt-holders, sold and shipped to defendants, and they converted to their own use, so much of the wheat so deposited that there was left in the warehouse, to meet the outstanding receipts, amounting to 2,647³/₄, only 1,144 bushels. This latter quantity was then distributed *pro rata* to the outstanding receipts. All the receipts other than those received by him have been sold to plaintiff, and he brings the action to recover for a conversion of the wheat so sold and shipped to defendants.

It being a general rule of law that a purchaser of personal property gets, ordinarily, no better title than his vendor has, it will be necessary to consider what was the right or title of Ehle & Co. in or to the wheat; that is, to consider what are the rights, in respect to grain stored in a general grain warehouse, of the depositor and depositee. This must be determined by the statute regulating such warehouses and deposits, which is found in the General Statutes of 1878, chapter 124, sections 13 to 20, inclusive. In several cases we have considered some of the features of that statute, but although in *Leuthold v. Fairchild*, 35 Minn. 99, we assumed, rather than fully determined, that a warehouseman who, without the consent of the depositors, disposes of so much of the grain deposited with him that there is not enough left in the warehouse to meet his receipts outstanding is liable to the holders of the receipts as for a conversion of their property, the question of the respective rights and relations of the depositor and depositee in such cases, and of the rights of a purchaser from the depositee, has never before been squarely brought before us.

The statute was passed for the better protection of depositors in such general grain warehouses. The evils to be cured were those which were supposed to follow the prior rule of law,—the rule of the common law. That rule was, that where a deposit was made of grain or other like property, with the expectation that it would be commingled in a common

mass of similar kind, deposited by different persons, so that its identity would necessarily be lost, and the undertaking of the depositor was not to redeliver the identical property deposited, but to deliver, in lieu thereof, an equal amount of the same kind of property, the title to the property deposited passed to the depositor. The deposit had the effect of a sale. The statute changes this rule, and provides (Gen. Stats. 1878, c. 124, sec. 13) that "such delivery shall in all things be deemed and treated as a bailment, and not as a sale." Of course, it cannot be understood from this that the depositor's title to the identical grain remains. The legislature must be taken to have had in view the way in which the business of such warehouses is, and of necessity must be, conducted. They are constantly receiving deposits of grain, and issuing receipts for it, and as constantly taking up outstanding receipts, and removing the amounts of grain called for by them, so that perhaps the same identical grain may not remain in the warehouse a week, though the amount in store is not diminished. The declaration that the delivery shall be deemed and treated as a bailment must be taken as meaning that the depositor shall be deemed to be the owner of and to have on bailment in the warehouse the amount of grain that he deposits, although its identity may have been lost by commingling with other the like kind of grain, and although not a kernel of the identical grain deposited still remains. As fast as grain is removed, and other grain is put into the common mass, the new grain takes the place of that originally deposited, and is appropriated to the contract of bailment, so as to become the property of the depositor: *Nat. Exchange Bank v. Wilder*, 34 Minn. 149.

The grain, of like kind and quality, of different depositors, not being kept separate, but put into a common mass, and each depositor owning the amount called for by his receipt, the different owners owning the entire mass, they own the mass as tenants in common, the interest of each being measured by the amount called for by his receipt. So if the owner of the warehouse put his own grain into the mass, he becomes a tenant in common of the entire body of the grain with the other owners. Ordinarily the partition is to be made by the warehouseman, who, when a receipt is presented, and the grain it calls for demanded, and the conditions of the right to a delivery of it complied with, delivers to the holder, as his share of the entire body of grain under that receipt, the

amount that it calls for. If the receipt-holder is put to his action of replevin, the sheriff makes the separation: Gen. Stats. 1878, c. 124, sec. 16. But while the interest of the depositor in the mass is measured by the amount he deposits, and mentioned in his receipt, the interest of the warehouseman, by reason of putting his own grain into the mass, is not necessarily measured by what he puts in; for if, from any cause for which he is responsible, as by his taking grain out from the mass, the whole amount is diminished below what is required to fill the outstanding receipts, what he puts in is appropriated at once, so far as may be necessary, to the receipts, and becomes at once the property of the holders. Thus if there is a shortage thus arising of two hundred bushels, and he puts in four hundred bushels of his own, his interest in the mass after that is equal to two hundred bushels, just the excess above what is required to fill the receipts. That amount, and no more, he has a right to take out and sell. It is true, it may be the practice—probably is—of warehousemen to take out and dispose of grain without reference to the relation which the amount in warehouse bears to the amount of the outstanding receipts. In other words, it may be their practice to dispose of the depositors' property. When this is done with the consent (such as the statute requires) of the depositors, it is, of course, rightfully done; and in that case a sale by the warehouseman would pass the title. No presumption of consent on the part of the depositor could arise from the existence, however general, of such a practice. Such a practice is made unlawful. Section 18 of the statute provides: "No person receiving or holding grain in store shall sell, or otherwise dispose of, or deliver out of the storehouse or warehouse where such grain is held or stored, the same, or any part thereof, without the express authority of the owner of such grain, and the return of the receipt given for the same, except as herein provided."

If the warehouseman be also a dealer in grain, his right to dispose of, as his own, the grain in the warehouse is limited to that which belongs to him, which he has purchased and put in, or when deposited by others, which he has purchased from them, and to the excess above what is required to meet his outstanding receipts. The statute clearly enacts that he shall not sell or otherwise dispose of grain on deposit. Its purpose is to provide that the grain shall remain in the warehouse where deposited, to meet the call of the owner. Ehle

& Co. were not the owners of, they had no title to, the grain which they sold or assumed to sell to the defendants. It belonged to the holders of the receipts.

Much argument has been expended to show the inconvenience to commerce in grain if in such cases the owner of the grain may, notwithstanding a wrongful sale by the warehouseman, follow the grain into the hands of the purchaser. As touching the matter of convenience, the argument has much force. It might tend greatly to facilitate traffic in grain if we had, in respect to it, such a rule as in England pertains to property sold in markets overt. But there is no such rule in this country. The general rule is, that an owner of personal property cannot be deprived of his right to it through the unauthorized act of another. That rule applies as well to grain or other property on deposit for the purpose of storing as to property in any other situation.

Order affirmed.

COMMINGLING OF PERSONAL PROPERTY. — As to the law relating to a confusion of goods, and the rights of the owners thereafter, see monographic note to *Pulcifer v. Page*, 54 Am. Dec. 589-597. The doctrine of confusion of goods is: If the goods can be distinguished and separated, each may claim his own; if the goods are of the same nature and value, as corn, tea, etc., of similar quality, then each may claim his aliquot part; but if the mixture is not distinguishable, nor an aliquot division possible, then the party who occasions, or through whose neglect or fault occurs, the wrongful mixture, must bear the whole loss: *Robinson v. Holt*, 39 N. H. 557; 75 Am. Dec. 233; *Hesseltine v. Stockwell*, 30 Me. 237; 50 Am. Dec. 627; *Sims v. Glenner*, 14 Ala. 695; 48 Am. Dec. 129; *Inglebright v. Hammond*, 19 Ohio, 337; 53 Am. Dec. 430; *First Nat. Bank v. Schwenn*, 127 Ill. 573; 11 Am. St. Rep. 174, and note; *Little Pittsburg etc. Co. v. Little Chief etc. Co.*, 11 Col. 223; 7 Am. St. Rep. 226; *O'Dell v. Leyda*, 46 Ohio St. 244.

STREISSGUTH v. NATIONAL GERMAN-AMERICAN BANK.

[43 MINNESOTA, 50.]

COLLECTING BANK LIABLE FOR DEFAULT OF ITS CORRESPONDENT. — A bank with which a customer leaves, for collection, his draft upon a party residing at a distant point is liable for the failure and default of a correspondent to whom it forwarded the draft for collection.

ACTION to recover the amount of a draft which the plaintiffs deposited with the defendant for collection. The draft was on a firm doing business at Lake Crystal, Minnesota, and was sent in due course of business to the defendant's correspond-

ent, a bank of good standing and credit at that place, to which it was paid by the drawees. Four days later the correspondent bank became insolvent, and has never paid over the amount collected. The defendant received the draft in the usual course of business, without any express agreement, and exercised ordinary care and prudence in selecting the correspondent bank as agent to collect it. In the usual course of business a small charge for collection was made, which went to the correspondent bank. As conclusions of law, the trial court held that the defendant was liable for its correspondent's default, and ordered judgment for the plaintiffs for the amount of the draft, with interest.

John B. and W. H. Sanborn, for the appellant.

Young and Lightner, for the respondents.

COLLINS, J. The single question presented by this appeal is, whether a bank with which a customer has left, for collection, his draft upon a party residing at some distant point can be held responsible for the failure and default of a correspondent to whom the bank has forwarded the draft for collection. It must be admitted that there is apparently a great conflict of precedents upon this precise question, and it is possible that, as contended by the appellant, the weight of the authorities, numerically speaking, is with the proposition that when, under such circumstances, a bank has exercised ordinary care and prudence in the selection of a correspondent to whom it transmits a draft, bill, or note for collection, and remittance of the proceeds, its liability terminates, because, as it is necessary and customary, and in the usual course of business, for banks to collect through correspondents, of which necessity, custom, and course of business the owners and holders of paper have full notice and knowledge, it must be held that they have assented to and authorized the work of collection through others. The question involves a rule of general application and of commercial law. As it concerns trade between different and distant places, and, in the absence of a statute or contract or usage which has obtained the force of law, is not to be determined according to the views or interests of any particular persons, classes, or localities, it should be decided according to those principles which govern and best promote the general welfare of the entire commercial community, and in accordance with the general principles

which apply to all who contract to perform a service. When the appellant received the draft for collection, it entered into a contract, by implication, to perform such duties as were necessary for the protection of its customer. It agreed to collect the paper itself, not to procure the services of another to make the collection. The plaintiffs had no voice in the selection of appellant's agent or correspondent, and it is difficult to see why banks and banking-houses should be excepted from the operation of a cardinal and well-established principle of law, that every person is liable for the acts of such agents as may be appointed or designated by him to transact such business as he has undertaken to perform for others. The appellant, having undertaken the collection of the paper, stands in the attitude of an independent contractor, who, having unrestrained liberty so to do, has designated a sub-agent, and is therefore answerable for his neglect, failure, or default. It is true that in the adjudicated cases cited by the appellant, strong arguments are found, and cogent reasons stated, in support of its position; but we are of the opinion that the conclusion we have reached is the sounder one upon principle. It is also sustained by the supreme court of the United States, and the courts of last resort of several of the states, including that of the great commercial center New York. It is also the rule in England: *Exchange Nat. Bank v. Third Nat. Bank*, 112 U. S. 276; *Allen v. Merchants' Nat. Bank*, 22 Wend. 215; 34 Am. Dec. 289; *Ayrault v. Pacific Bank*, 47 N. Y. 570; 7 Am. Rep. 489; *Simpson v. Waldby*, 63 Mich. 439; *Titus v. Mechanics' Nat. Bank*, 35 N. J. L. 588; *Reeves v. State Bank*, 8 Ohio St. 465; *Tyson v. State Bank*, 6 Blackf. 225; *Am. Express Co. v. Haire*, 21 Ind. 4; 83 Am. Dec. 334; *Mackersy v. Ramsays*, 9 Clark & F. 818; *Van Wart v. Woolley*, 3 Barn. & C. 439.

Judgment affirmed.

BANKS AND BANKING. — Liability of a collecting bank for the negligence of its correspondents: See note to *Allen v. Merchants' Bank*, 34 Am. Dec. 313-316; *Manufacturers' Nat. Bank v. Continental Bank*, 148 Mass. 553; 12 Am. St. Rep. 598, and note. A bank employed to collect a draft drawn on a person at a distance is responsible for the failure or dishonesty of its correspondent: *Simpson v. Waldby*, 63 Mich. 439.

MAGIN v. LAMB.

[23 MINNESOTA, 99.]

ACTION TO SET ASIDE JUDGMENT ENTERED WITHOUT OBTAINING JURISDICTION. — An action may be maintained to set aside a judgment rendered by a court which had obtained no jurisdiction from want of service of process. And in such action it is not necessary for the plaintiff to show that he had a defense to the first action, where the equitable and legal jurisdictions are united in the same court, and the action is prosecuted in the same court in which the judgment was rendered.

ACTION TO SET ASIDE JUDGMENT MAY BE MAINTAINED AGAINST ASSIGNEE thereof, and the original judgment creditor need not be made a party thereto.

ACTION to set aside judgment. The opinion states the case.

B. D. Smith, Freeman and Ifau, and Hawes, Loman, and Scaffeld, for the appellant.

Lorin Cray and J. L. Washburn, for the respondent.

DICKINSON, J. The defendant Lamb is the assignee of a judgment heretofore entered in the district court in favor of Pitts and others against Anton Magin. The plaintiff, alleging that no summons was ever served upon him in that action, that he did not appear therein, and did not know of the judgment until its enforcement was attempted, prosecutes this action to have the judgment set aside, and to enjoin its enforcement. It is conceded and claimed on both sides that this judgment is to be deemed as having been entered against this plaintiff, against whom the defendants were proceeding to enforce it when this action was commenced. The relief sought having been granted in this action, the defendant Lamb appealed from the judgment. The case is presented upon the pleadings, findings of the court, and the judgment, the evidence not being before us.

There is some controversy as to the meaning of the findings of the court. It appears that in the summons and complaint in the action in which the judgment in question was rendered the person therein named as defendant was "Anthony Magin," and the proof of service of the summons, by the affidavit of a person not having official authority to make such service, named Anthony Magin as the person served. The court found as a fact that the summons was served on Anthony Magin. There being a default to appear in that action, judgment was entered against "Anton Magin." But the court further found that neither the summons nor complaint in said

action was ever served on this plaintiff. Reading the findings of the court with regard to the issue made in the pleadings, they must be deemed to have the meaning that while the summons was served upon a person named Anthony Magin, that person was not this plaintiff, and that no summons was ever served upon this plaintiff. The legal result is, that the judgment was entered without jurisdiction having been acquired of the person of this plaintiff; and assuming him to have been the person against whom the judgment was entered, it was void. The court further finds that this plaintiff did not know of that judgment until just before the commencement of this action.

The appellant contends that in this action the judgment is assailed collaterally, and that this is not allowable. This is not a collateral but a direct attack upon the judgment. That is the very object of the action. It was not necessary to make the original judgment creditors parties to the action. The judgment having been assigned to Lamb, he stands in their place, and is the only party in interest.

An action is maintainable to set aside a judgment upon the ground that there was no jurisdiction, for want of service of process: *Ferguson v. Crawford*, 70 N. Y. 253; 26 Am. Rep. 589; *Arnold v. Hawley*, 67 Iowa, 313; *Jeffery v. Fitch*, 46 Conn. 601; *Caruthers v. Hartsfield*, 8 Yerg. 366; 24 Am. Dec. 580; *Hickey v. Stone*, 60 Ill. 458; *Johnson v. Coleman*, 23 Wis. 452; 99 Am. Dec. 193; *Freeman on Judgments*, 3d ed., sec. 495. That a judgment may be set aside for such cause, on motion addressed to the court in which the judgment was entered, has been determined in *Heffner v. Gunz*, 29 Minn. 108; *Lee v. O'Shaughnessy*, 20 Minn. 157, 173; and *Stocking v. Hanson*, 35 Minn. 207; and no substantial reason can be assigned why an action should not be entertained for this purpose as well as a motion, especially when, under our system of practice, the action is in the same court in which the judgment was rendered.

In *Lee v. O'Shaughnessy*, 20 Minn. 157, 173, and in *Heffner v. Gunz*, 29 Minn. 108, it was held, the judgment being absolutely void, that it was not incumbent on the moving party to show that he had a defense on the merits to such an action. It was enough that no action had been commenced against him. It was intimated *obiter*, in the opinion in the latter case, that in a suit in equity it would be incumbent on the plaintiff to show reasons for equitable intervention beyond the

bare fact of want of jurisdiction; and such was the prevailing rule when the interference of courts of equity was sought to restrain the enforcement of judgments of separate courts of law. But the reasons for any distinction in respect to the conditions upon which relief is to be granted in an action to restrain or vacate a judgment, and in a motion for the same purpose, have disappeared with the uniting of equitable and legal jurisdictions in the same court. If, now, a defendant, upon motion to the court rendering a judgment, may have it set aside merely because no action was ever commenced against him, there is no longer any reason why, if he prosecutes an action in the same court, for the same purpose, any different grounds for relief should be required.

If the judgment was void, and not merely irregular or erroneous, the fact that it has been assigned does not prevent relief, if the party against whom it has been entered is not chargeable with laches. The assignee stands in no better position than the assignor, unless the plaintiff's rights have been prejudiced by some fault on his part.

The point made by the appellant that this plaintiff, if not served with process, is a stranger to the judgment and cannot assail it, is inconsistent with the position taken in the answer, in which it is conceded and claimed that the judgment was rendered against this plaintiff, and was in the course of being enforced against him.

Under the findings of the court, the subject of the difference between the names of "Anthony" and "Anton" is not material. This case is controlled by the fact, as found, that no summons was served upon this plaintiff; that he did not appear in the action; and that a judgment was entered which both parties concede to be against him, and which the defendant was proceeding to enforce against him.

Judgment affirmed.

JUDGMENTS VOID FOR WANT OF JURISDICTION.—An action may be maintained to set aside a judgment rendered by a court which had no jurisdiction, for want of service of process: Note to *Taylor v. Lewis*, 19 Am. Dec. 137-139. A domestic judgment may be collaterally impeached for want of jurisdiction: *Martin v. Gray*, 19 Kan. 458; 27 Am. Rep. 149. But in *Woods v. Brown*, 93 Ind. 164, 47 Am. Rep. 369, it is decided that a judgment will not be vacated upon the mere grounds that there was no service of process and that defendant was insane. Compare *Great West Min. Co. v. Woodman*, 12 Col. 46; 13 Am. St. Rep. 204, and note; *People v. Greene*, 74 Cal. 400; 5 Am. St. Rep. 448, and note 453-455; note to *Oliver v. Pray*, 19 Am. Dec. 603-612.

ASSIGNMENT OF JUDGMENT — LIABILITY OF ASSIGNER. — The assignee of a judgment holds it subject to the same defenses as the assignor: Note to *Dugas v. Mathews*, 54 Am. Dec. 363, 369; *Ballinger v. Tarbell*, 16 Iowa, 491; 85 Am. Dec. 527, and note; *Isett v. Lucas*, 17 Iowa, 503; 85 Am. Dec. 572, and note.

MILLER v. MENDENHALL.

[43 MINNESOTA, 95.]

STATE HOLDS TITLE TO LANDS COVERED BY NAVIGABLE WATERS to low-water mark, in its sovereign capacity, in trust for the people, for the purpose chiefly of protecting the rights of navigation. But the common right of the people in such lands is limited to what is of public use for the purposes of navigation and fishery; and the riparian owners are permitted to enjoy the remaining rights and privileges in the soil under water beyond their strict boundary lines, after conceding to the state all the public rights.

RIPARIAN OWNER MAY FILL IN AND MAKE IMPROVEMENTS IN SHALLOW WATER in front of his land, out to the line of navigability; and such improvements are encouraged because they are in the general interest of navigation and commerce, and are a public as well as a private benefit. These riparian privileges are valuable property rights, the exercise of which, though subject to state regulation, can only be interfered with by the state for public purposes.

DOCK LINE, EFFECT OF ESTABLISHING, ON RIGHT OF RIPARIAN OWNER. — The action of a state legislature in establishing a dock or harbor line is to be construed as a regulation of the exercise of the riparian right; it settles the line of navigability, above which the state will not interfere, and is an implied concession of the right to build, possess, and occupy to the established line, which amounts practically to a qualified possessory title.

GRANTS OF RIPARIAN RIGHTS WITHIN DOCK LINE, EFFECT OF. — Where the owners of upland bordering on navigable waters, after the legislature has established a dock line, adopt a survey and plan of improvement for the use and occupation, up to the dock line, of the submerged land in front of their upland, they may possess, occupy, and improve the same themselves, in connection with the dry land, or they may grant to others the same rights within the dock line, and may, by appropriate covenants and stipulations in the deeds to their grantees, obligate them to respect and recognize the validity of such grants made in conformity with the general plan of improvement of the premises within the dock line, all the grantees thus becoming parties thereto; and a court of equity will not, in such a case, interpose in favor of a grantee of a portion of the upland to set aside prior deeds to sites in the submerged land.

THE opinion states the case.

Mahon and Howard, for the appellant.

Walter Ayers, for the respondent.

VANDEBURGH, J. This case involves the consideration of the riparian rights of the owners of lands abutting upon the Duluth harbor, or Bay of Superior, in the shoals or land covered by water between low-water mark and the deep or navigable waters, and within the dock or harbor line established by the authority of the legislature. These waters are within the jurisdiction of the state and federal governments, and the state holds the title to low-water mark in its sovereign capacity, in trust for the people, for the purpose chiefly of protecting the rights of navigation. But though the title is nominally in the state, the common right of the people is limited to what is of public use for the purposes of navigation and fishery; and the riparian owners are permitted to enjoy the remaining rights and privileges in the soil under water beyond their strict boundary lines, after conceding to the state all the public rights: Gould on Waters, sec. 168. The right of access and communication with the navigable waters, which pertain peculiarly to the ownership of the upland, in order to be available and of practicable use, necessarily includes the right to fill in and to build wharves and other structures in the shallow water in front of such land, and below low-water mark, and the exercise of such rights, though subject to state regulation, can only be interfered with for public purposes; and such improvements are encouraged because they are in the general interest of navigation and commerce, and are a public as well as a private benefit. In *Dutton v. Strong*, 1 Black, 23, 32, it is said that "wherever the water is too shoal to be navigable, there is the same necessity for such erections for lake navigation as in the bays and arms of the sea; and where that necessity exists, it is difficult to see any reason for denying to the adjacent owner the right to supply it." And in *Yates v. Milwaukee*, 10 Wall. 497, it is held broadly that these riparian privileges are to be treated as valuable property rights, which cannot be taken or interfered with for public use without compensation: *Union Depot etc. Co. v. Brunswick*, 31 Minn. 297; 47 Am. Rep. 789. And if a stranger makes a filling or an obstruction in the waters in front of his land, the owner of the adjacent upland may enjoin its continuance, or recover in trespass, if not in ejectment.

In the case before us, the complaint shows that a corporation known as the Duluth Improvement Company was the owner of a large tract of land bordering upon the waters of Duluth harbor, which communicates with Lake Superior, and

is navigable for large boats and vessels. In front of this land, and for a considerable distance into the bay, the water is shallow, and not navigable; and in pursuance of legislative authority, a dock or harbor line had been duly established by the city of Duluth, extending in front of, and at a distance of a thousand feet or more from, the low-water mark on the tract of land referred to. Thereafter the improvement company caused this land, together with the land in front thereof under water, out to the dock line, to be surveyed and platted into lots and blocks, piers, slips, avenues, and streets, and caused a plat thereof to be duly made and recorded, under the name of the Bay Front Division of Duluth, and thereafter proceeded to convey divers lots and parcels of the platted land, as well land under water as the dry land, to divers persons, by reference to the recorded plat, and by conveyances of the form set out in the complaint, and containing special covenants and stipulations, as hereinafter mentioned.

The complaint further proceeds as follows: "That on or about the twenty-seventh day of June, 1887, the said Duluth Improvement Company sold and conveyed to Luther Mendenhall, defendant herein, by deed duly executed, a copy whereof is hereto annexed and made a part of this complaint, the following described tract or parcel of land, the same being a part of the land hereinabove referred to, to wit: All that part of block twenty-seven (27) in the Bay Front Division of Duluth, first rearrangement, according to the recorded plat thereof, that lies easterly of a line through said block, parallel with and at equal distances from the lines dividing said block from block twenty-six (26) and from block twenty-eight (28), in said division. That said Duluth Improvement Company, on or about the thirtieth day of July, 1887, sold and conveyed to plaintiff, by deed duly executed, and identical in form with and containing the same covenants as the deed to Luther Mendenhall, hereinabove referred to, the following described tract or parcel of land, being a part of the land hereinabove referred to, to wit: All that part of block twenty-seven (27) in the Bay Front Division of Duluth, first rearrangement, according to the recorded plat thereof, that lies westerly of a line through said block parallel with and at equal distance from the lines dividing said block from block twenty-six (26) and from block twenty-eight (28), in said division, saving and excepting so much of said tract as lies within one hundred (100) feet of the southeasterly boundary

line thereof, which said property so excepted is hereby dedicated for the perpetual use of a slip or water-way for the use and benefit of the owners and occupants of property abutting thereon. Plaintiff further alleges that the greater part of said block 27, so as aforesaid conveyed to plaintiff by the Duluth Improvement Company, consisted of dry land and shore, and that the same extended to the low-water mark on said bay. That all of that part of said block 27, so as aforesaid conveyed to Luther Mendenhall by said Duluth Improvement Company, lies under the water of the bay, beyond the low-water mark of said bay, and in front of and between that part of said block 27, so as aforesaid conveyed to plaintiff, and said established dock or wharf line upon said Duluth harbor. That the said Luther Mendenhall claims title to the part of said block 27, so as aforesaid conveyed to him by the Duluth Improvement Company, under and by virtue of said deed of conveyance to him, and claims the right to cut off and exclude plaintiff from access to the navigable waters of said bay over and across his part of that block, and denies the right of the plaintiff to dock out or make improvements in front of his part of the block to the established dock line, and claims and asserts that all the riparian rights to which plaintiff would be entitled, as owner of the shore along said harbor, are absolutely cut off and limited by the conveyance so as aforesaid made to him, said Mendenhall, as also by the conveyance made to the plaintiff."

Following the descriptions in the deeds to these parties, and to other grantees of the platted lands above referred to, we find the following clauses, covenants, and stipulations, viz.: "Together with all the hereditaments thereunto belonging, or in any wise appertaining, but subject, nevertheless, to the reservations exceptions, and conditions of this instrument. And the said party of the first part, for itself, its successors and assigns, does covenant with the said party of the second part, his heirs and assigns, that it has not made, done, executed, or suffered any act or thing whatsoever, whereby the above-described premises, or any part thereof, now are, or at any time hereafter shall or may become, imperiled, charged, or encumbered in any manner whatsoever; and the title to the above-granted premises, against all persons lawfully claiming the same from or under it, the said party of the first part will forever warrant and defend. It being the intention hereby to vest in the said party of the second part, his heirs and assigns forever, the exclusive right to use, occupy, and enjoy

the space covered by the above-mentioned lots, as laid down upon the said recorded plat of said Bay Front Division of Duluth, first rearrangement, and to estop the party of the first part, its successors and assigns, from having or claiming the use or occupancy of said space by virtue of riparian ownership or otherwise. This conveyance is and shall be construed as a contract between the parties hereto. The character and extent of the premises and the rights and privileges thereunto appertaining, whether riparian or other rights, shall be determined solely by reference to the plat of said division; and no rights or privileges of any kind shall pass by this conveyance except such as said plat shows to be appurtenant to the premises herein conveyed. The said party of the second part hereby estops himself, his heirs and assigns, from asserting or claiming that the lots or blocks, if any are shown on said plat, between the premises herein conveyed and the established dock line along the northerly side of the bay or harbor of Duluth, are not land, and estops himself from claiming or asserting any rights or privileges under this grant in any part of the territory covered by said plat, except such as would solely by reference to said plat vest in him."

The case comes here on appeal from an order sustaining a demurrer to the complaint. In connection with the general statement in respect to the rights of riparian owners already made, we are to consider the additional fact of the establishment of the dock or harbor line, and the effect of the restrictive covenants in the deeds to the respective parties. The court will take notice of the extensive commerce and great shipping interests which must be accommodated in the Duluth harbor, and which will require corresponding facilities in the way of local improvements, which must be made in great measure by private enterprise; and in this case we may assume that the plan adopted by the Duluth Improvement Company, in the survey and plat of the submerged land in connection with the upland, was one which was suitable and proper for the improvement and occupation of the same in the interests of navigation, so as to subserve the public as well as private interests.

The action of the state, through the legislature, in establishing the dock lines, is to be construed in connection with the established doctrine of riparian rights of which we have spoken, and the practical use permitted and necessarily made by riparian owners of land under water in front of the dry or

up land. In *Aborn v. Smith*, 12 R. I. 370, it is said by the court that the owners of the upland are in such cases impliedly permitted to carry the upland forward to the harbor line, so that each owner will occupy the part abreast his own land. In *Gerhard v. Seckont etc. Comm'rs*, 15 R. I. 334, and in *Engle v. Peckham*, 11 R. I. 210, 223, 224, it is held to be a permission and invitation by the state to the riparian owner to fill out and incorporate the flats with his upland to the line: *Eldridge v. Cowell*, 4 Cal. 80. In *Fitchburg R. R. Co. v. Boston and Maine R. R. Co.*, 3 Cush. 53, 71, it appeared that the legislature had established a harbor line for Boston harbor, but prohibited the extension of the existing wharves to the line without legislative permission. Afterwards the legislature passed an act authorizing the owners of certain wharves to extend them out to the line. This act was held to be a grant, and not a mere revocable license (page 87); and in *Hamlin v. Pairpoint Mfg. Co.*, 141 Mass. 51, 57, a legislative authority to extend wharves to the channel of a river was held equivalent to a grant of a possessory title, if not an absolute interest in the soil. In *Norfolk City v. Cooke*, 27 Gratt. 430, 433, the court treat the right to use and occupy the land within such lines with wharves, etc., as a qualified proprietary interest in the soil, sufficient to support an action for the possession: *Guy v. Hermance*, 5 Cal. 73; 63 Am. Dec. 85; *Power v. Tasewells*, 25 Gratt. 786. But the title of the state is not extinguished by such legislative action merely. In this country the generally accepted doctrine is, that the *jus privatum* passes to the owner of the adjacent lands, and in this state extends to low-water mark, with the accompanying riparian rights, while the *jus publicum* belongs to the state, which hold the title to the soil under the water as trustee. "The sovereign is trustee for the public, and the use of navigable waters is inalienable": 3 Kent's Com. 427. See *Commonwealth v. Alger*, 7 Cush. 53, 89, 98.

The state is authorized to regulate the exercise of riparian rights in the interests of the public, and may also make concessions to private owners of possessory rights in the soil of navigable waters, the effect of which will be to give them private and exclusive rights equivalent to a grant: Gould or Waters, secs. 138-140. While the public right of navigation and fishery may not be extinguished until the waters are excluded, yet after the submerged land is filled or occupied the riparian owner will have the exclusive right of possession, and the entire beneficial interest; and whether his dominion

would be absolute, and his title indefeasible as against the state, is not necessary to inquire: *Union Depot etc. Co. v. Brunswick*, 31 Minn. 297; 47 Am. Rep. 789. The action of the legislature in establishing a harbor line is to be construed as a regulation of the exercise of the riparian right; it settles the line of navigability, above which the state will not interfere; and is an implied concession of the right to build, possess, and occupy to the established line, which amounts practically to a qualified possessory title: *Hamlin v. Pairpoint Mfg. Co.*, 141 Mass. 51, 57. The importance and substantial character of these rights are recognized by the courts, and there is a growing tendency in different directions to give effect to contracts and grants in respect to riparian occupancy and improvements: *Norfolk City v. Cooke*, 27 Gratt. 430, 436; *Parker v. West Coast Packing Co.*, 17 Or. 510, 515. It is true, the right of access and communication with the navigable water belongs exclusively to the riparian owner, except with his permission. But if in the case of a railway corporation he may, for a consideration, concede the right to occupy with its road-bed the land under the shore, and obstruct such communication, by a valid contract, which we presume will not be questioned, why may he not contract with natural persons to grant to them the right of possession and occupancy of building sites within the dock line, for wharves or elevators, for use in connection with navigation, or such other purposes (the state not objecting) as the grantees may be advised, with right of way, if need be, over his land, or, as in this case, impliedly over streets laid over the same, as designated in the plat and dedicated to the public use? In many instances, however, such right of entry or easement of passage may be found entirely unnecessary, the occupant having other means of reaching the *locus in quo*. If the riparian owner may make such improvements, and afterwards grant and convey his possessory title, or contract to do so, the courts ought not to stand upon so narrow a distinction as that he may not bind himself by contract that another may have and enjoy the same possessory rights in a particular site or lot which he has in it; for his right is not a mere revocable license, though held in subordination to the public interest, and subject to some restraint for the general good as other property may be, though differently situated: *Commonwealth v. Alger*, 7 Cusk. 53, 95.

There can be no doubt, we think, that a lease of such property would be operative between the parties, and a subsequent

purchaser of the upland, with notice, and expressly subject thereto, would also be bound to respect the lessee's rights. In reference to a lease of a mill site in the bed of the Mississippi River (at a place not navigable), this court say in *St. Anthony Falls Water Power Co. v. Morrison*, 12 Minn. 162, 249, 254: "It is not for a private individual, under a pretense of vindicating the abstract rights of the public, to set up the intrusion, in a private and civil action, for the purpose of repudiating his own solemn contract obligations."

In this case the respondent does not find it necessary to question the correctness of the decision in the case of *Lake Superior Land Co. v. Emerson*, 38 Minn. 406, 8 Am. St. Rep. 679, because there the grantor simply undertook to convey a strict legal title, which until the land was reclaimed could not be the subject of transfer, and we are not called on to distinguish that case. But this case is rested upon the contract of the parties, incorporated in the several deeds, in which it will be seen the grantor covenants that the grantees and their assigns "shall have the exclusive right to use, occupy, and enjoy the space covered by the lots" as described in the deed, and as identified by the plat, and covenants "to estop the company and its assigns from having or claiming the use and occupancy of said space by virtue of riparian ownership, or otherwise." Here there is an express waiver and concession of the grantor's riparian rights in the premises, and consent to the use and occupancy thereof, so as to cut off its access and communication with deep water, except in accordance with the general plan of improvement indicated by the plat. And this is also made a part of plaintiff's contract, and undoubtedly entered into and affected the consideration of the deed to him. He thereby made himself a party to the general plan and arrangement for the improvement and disposition of the property, in which there was nothing unlawful. He took with notice of defendant's deed. We see no reason why he should be relieved from the legitimate operation of these covenants, or why a court of equity should interpose to cancel or declare null and void the defendant's deed, in order to give the plaintiff rights he has expressly agreed to waive.

Order affirmed.

RIGHTS OF LAND-OWNERS IN NAVIGABLE WATERS FRONTING THEIR LANDS, AND IN THE LANDS UNDER SUCH WATERS. — As the rights of riparian owners on non-navigable waters are different from those that are enjoyed by riparian owners on navigable waters, it is necessary to determine what

waters are deemed navigable in law. By the common law of England, only those rivers in which the tide ebbs and flows are navigable; and they are treated as navigable only so far as the tide ebbs and flows. Up to the time of the Revolution, therefore, tide-waters alone were deemed to be navigable in law. This continued to be the case for more than half a century later. In 1845, Congress passed an act which provided that "the district courts of the United States shall have powers, and exercise the same jurisdiction, in matters of contract and tort arising in, upon, or concerning steamboats and other vessels of twenty tons' burden and upwards, enrolled and licensed for the coasting trade, and at the same time employed in business of commerce and navigation between ports and places in different states and territories, upon the lakes and navigable waters connecting said lakes, as is now possessed and exercised by the said courts in cases of like steamboats and other vessels employed in navigation and commerce upon the high seas or tide-waters within the admiralty and maritime jurisdiction of the United States": 5 U. S. Stat. at Large, 726. In the case of *Propeller Genessee Chief v. Fitzhugh*, 12 How. 443, it was urged that this act was unconstitutional, on the ground that the constitutional grant of admiralty powers did not extend above tide-waters, and that Congress could not, therefore, extend it by legislation. The supreme court, however, decided that the admiralty jurisdiction in this country extends to all waters, whether salt or fresh, where navigation aids commerce between the different states, or with foreign nations. Chief Justice Taney, who delivered the opinion of the court, said: "The only objection made to this jurisdiction is, that there is no tide in the lakes or the waters connecting them; and it is said that the admiralty and maritime jurisdiction, as known and understood in England and in this country at the time the constitution was adopted, was confined to the ebb and flow of the tide. Now, there is certainly nothing in the ebb and flow of the tide that makes the waters peculiarly suitable for admiralty jurisdiction, nor anything in the absence of a tide that renders it unfit. If it is a public navigable water on which commerce is carried on between the different states or nations, the reason for the jurisdiction is precisely the same. And if a distinction is made on that account, it is merely arbitrary, without any foundation in reason; and, indeed, would seem to be inconsistent with it. In England, undoubtedly, the writers upon the subject, and the decisions in its courts of admiralty, always speak of the jurisdiction as confined to tide-water. And this definition in England was a sound and reasonable one, because there was no navigable stream in the country beyond the ebb and flow of the tide; nor any place where a port could be established to carry on trade with a foreign nation, and where vessels could enter or depart with cargoes. In England, therefore, tide-water and navigable water are synonymous terms. . . . At the time the constitution of the United States was adopted, and our courts of admiralty went into operation, the definition which had been adopted in England was equally proper here. In the old thirteen states, the far greater part of the navigable waters are tide-waters. And in the states which were at that period in any degree commercial, and where courts of admiralty were called on to exercise their jurisdiction, every public river was tide-water to the head of navigation." Since this decision was rendered, the ebb and flow of the tide have ceased to be regarded, in the United States courts, as the test of navigability of American waters, and rivers and lakes navigable in fact are held to be navigable in law. And this is the sense in which the phrase "navigable waters of the United States" is to be understood wherever it occurs in acts of Congress. The rule that made

tide-water synonymous with navigable not only limited the jurisdiction of admiralty courts, but also determined the property rights of riparian owners. In the case of *Barney v. Keokuk*, 94 U. S. 324, 333, Mr. Justice Bradley, who delivered the opinion of the court, said: "The confusion of navigable with tide water, found in the monuments of the common law, long prevailed in this country, notwithstanding the broad differences existing between the extent and topography of the British island and that of the American continent. It had the influence for two generations of excluding the admiralty jurisdiction from our great rivers and inland seas; and under the like influence it laid the foundation in many states of doctrines with regard to the ownership of the soil in navigable waters above tide-water at variance with sound principles of public policy. Whether, as rules of property, it would now be safe to change these doctrines where they have been applied, as before remarked, is for the several states themselves to determine. If they choose to resign to the riparian proprietor rights which properly belong to them in their sovereign capacity, it is not for others to raise objections. In our view of the subject, the correct principles were laid down in *Martin v. Waddell*, 16 Pet. 367; *Pollard's Lessee v. Hagan*, 3 How. 212, and *Goodtitle v. Kibbe*, 9 How. 471. These cases related to tide-water, it is true; but they enunciate principles which are equally applicable to all navigable waters. And since this court, in the case of *The Genessee Chief*, 12 How. 443, has declared that the Great Lakes and other navigable waters of the country, above as well as below the flow of the tide, are, in the strictest sense, entitled to the denomination of navigable waters, and amenable to the admiralty jurisdiction, there seems to be no sound reason for adhering to the old rule as to the proprietorship of the beds and shores of such waters. It properly belongs to the states by their inherent sovereignty, and the United States has wisely abstained from extending (if it could extend) its survey and grants beyond the limits of high water. The cases in which this court has seemed to hold a contrary view depended, as most cases must depend, on the local laws of the states in which the lands were situated."

The ordinance of 1787 for the government of the territory of the United States northwest of the river Ohio provided that the navigable waters leading into the Mississippi and St. Lawrence shall be common highways, and forever free. But while the United States courts and Congress have adopted and acted upon the doctrine that all waters navigable in fact are navigable in law, and that owners of lands fronting on such waters take only to ordinary high-water mark, a majority of the states still adhere to the doctrine of the English common law. In all the original thirteen states, except North Carolina, Pennsylvania, and Virginia, it is still held that rivers above the ebb and flow of the tide, and rivers in which there is no tide, are non-navigable, and that the riparian proprietors thereon own to the middle line of the stream, and if a person owns lands on both sides of such a river, he is the owner of the whole bed of the stream to the extent of the length of his lands upon it. The states of Ohio, Kentucky, Illinois, Michigan, Mississippi, and Wisconsin also adhere to the doctrine of the English common law on this subject: *Day v. Railroad Co.*, 44 Ohio St. 406; *June v. Purcell*, 36 Ohio St. 396; *State v. Shannon*, 36 Ohio St. 423; *Sloan v. Biemiller*, 34 Ohio St. 492; *Gavit v. Chambers*, 3 Ohio, 496; *Williamsburg Boom Co. v. Smith*, 84 Ky. 372; *Berry v. Snyder*, 3 Bush, 286; *Fuller v. Dauphin*, 124 Ill. 542; 7 Am. St. Rep. 388; *Washington Ice Co. v. Shortall*, 101 Ill. 46; 40 Am. Rep. 196; *Hovck v. Yates*, 82 Ill. 179; *Middleton v. Prichard*, 3 Scam. 510; 38 Am. Dec. 112; *Maxwell v. Bay City B. Co.*, 41 Mich. 453; *Thunder Bay B. Co. v. Speechly*, 31 Mich. 336; 18 Am.

Rep. 184; *Bay City G. L. Co. v. Industrial Works*, 28 Mich. 182; *Watson v. Peters*, 26 Mich. 508; *Clark v. Campau*, 19 Mich. 325; *Ryan v. Brown*, 18 Mich. 196; 100 Am. Dec. 154; *Rice v. Ruddiman*, 10 Mich. 125; *Lorman v. Benson*, 8 Mich. 18; 77 Am. Dec. 435; *Moore v. Sanborne*, 2 Mich. 519; 59 Am. Dec. 299; *Steamboat Magnolia v. Marshall*, 39 Miss. 169; *Diedrich v. North Western etc. R'y Co.*, 42 Wis. 248; 24 Am. Rep. 399; *Delaplaine v. Chicago etc. R'y Co.*, 42 Wis. 214; 24 Am. Rep. 386; *Greene v. Nunnemacher*, 33 Wis. 50; *Wright v. Day*, 33 Wis. 280; *Armond v. Green Bay Co.*, 31 Wis. 346; *Yates v. Judd*, 16 Wis. 118; *Harrington v. Edwards*, 17 Wis. 586; 84 Am. Dec. 768; *Walker v. Shepardson*, 4 Wis. 486; 65 Am. Dec. 324; *Jones v. Pettibone*, 2 Wis. 308. In Indiana this question does not seem to be definitely settled: *Gould on Waters*, sec. 71; *Sherlock v. Bainbridge*, 41 Ind. 35; 13 Am. Rep. 362; *Dawson v. James*, 64 Ind. 162.

The doctrine of the English common law has been rejected, and that of the supreme court of the United States, laid down in the cases of *The Genessee Chief*, 12 How. 443, and *Barney v. Keokuk*, 94 U. S. 324, 328, has been adopted in Alabama, Arkansas, Iowa, Kansas, Minnesota, Missouri, North Carolina, Tennessee, Virginia, and West Virginia: *Bullock v. Wilson*, 2 Port. 436; *Hagan v. Campbell*, 8 Port. 9; 33 Am. Dec. 267; *Mobile v. Eslava*, 9 Port. 577; 33 Am. Dec. 325; *Mages v. Hallett*, 22 Ala. 699; *Rhodes v. Otis*, 33 Ala. 578; 73 Am. Dec. 439; *Peters v. New Orleans etc. R. R. Co.*, 56 Ala. 528; *Williams v. Glover*, 66 Ala. 189; *St. Louis etc. R'y Co. v. Ramsey*, Sup. Ct. Ark., May, 1890; *McManus v. Carmichael*, 3 Iowa, 1; *Haight v. Keokuk*, 4 Iowa, 199; *Tomlin v. Dubuque etc. R. R. Co.*, 32 Iowa, 106; 7 Am. Rep. 176; *Musser v. Hershey*, 42 Iowa, 356; *Houghton v. C. D. M. R. Co.*, 47 Iowa, 370; *Reauwick v. D. & N. W. R'y Co.*, 49 Iowa, 664; *Steele v. Sanchez*, 72 Iowa, 65; 2 Am. St. Rep. 233; *Wood v. Fowler*, 26 Kan. 682; 40 Am. Rep. 330; *Hanford v. St. Paul etc. R. R. Co.*, 43 Minn. 104; *Union Depot etc. Co. v. Brunswick*, 31 Minn. 297; 47 Am. Rep. 789; *Brisbane v. St. Paul etc. R. R. Co.*, 23 Minn. 114; *Benson v. Morrow*, 61 Mo. 245; *Collins v. Benbury*, 3 Ired. 277; 38 Am. Dec. 722; *Goodwin v. Thompson*, 15 Len. 209; 54 Am. Rep. 410; *Stuart v. Clark*, 2 Swan, 9; 58 Am. Dec. 49; *Sigler v. State*, 7 Baxt. 493; *Elder v. Burrus*, 6 Humph. 358; *Norfolk City v. Cooke*, 27 Gratt. 430; *Rosenwood v. Flemings*, 22 W. Va. 52; 46 Am. Rep. 485.

In the case of *Elder v. Burrus*, 6 Humph. 367, Turley, J., delivering the opinion of the court, said: "To adopt the English principle, that no river is a navigable river above the ebb and flow of the tide, would be to declare that there is no river navigable in the valley of the Mississippi; and that the Mississippi, Missouri, Ohio, and Tennessee do not belong to the public, but are the property of individual owners of land upon their margins, — an absurdity too monstrous to be thought of."

Under the laws of North Carolina and Virginia of early date the beds of navigable rivers, whether salt or fresh, could not be granted as private property: *Collins v. Benbury*, 3 Ired. 118; 42 Am. Dec. 155; *Norfolk City v. Cooke*, 27 Gratt. 430; *Horns v. Richards*, 4 Call, 441; 2 Am. Dec. 574.

The Pennsylvania law on the subject under discussion is somewhat peculiar. The common-law rules are held not to apply to the rivers of that state above the ebb and flow of the tides: *Shrunk v. Schuylkill Nav. Co.*, 14 Serg. & R. 71. All streams capable of being navigated are regarded as navigable in law: *Flanagan v. City of Philadelphia*, 42 Pa. St. 219. The beds, gravel, and sand-bars of such rivers are not subject to private appropriation under the ordinary land laws: *Poor v. McClure*, 77 Pa. St. 214. Grants of lands bordering on navigable rivers go to low-water mark: *Futner v. Williams*, 122

Pa. St. 191; 9 Am. St. Rep. 88; *Flanagan v. City of Philadelphia*, 42 Pa. St. 219; *Wainwright v. McCullough*, 63 Pa. St. 66; *Poor v. McClure*, 77 Pa. St. 214; *Harvey v. Thomas*, 10 Watts, 63; 36 Am. Dec. 141. Such grants, however, give an absolute title to high-water mark only, and a qualified title to the land between high-water mark and low water mark. The grantee's title to the space between high and low-water mark is subject to the right of navigation in the public. He can only use that space for such purposes as do not interfere with the free flow and navigation of the water. The state may use it for navigation purposes without compensation, and may protect it from an unauthorized use even by the riparian owner: *Fulmer v. Williams*, 122 Pa. St. 191; 9 Am. St. Rep. 88; *Philadelphia v. Scott*, 81 Pa. St. 80; *Zug v. Commonwealth*, 70 Pa. St. 138; *Wainwright v. McCullough*, 63 Pa. St. 66; *Stover v. Jack*, 60 Pa. St. 339; 100 Am. Dec. 566. But a third person has no right to erect a wharf on land below high-water mark on navigable waters without permission of the owner of the adjoining fast land: *Ball v. Slack*, 2 Whart. 506; 30 Am. Dec. 278.

The question as to the ownership of the soil and fisheries of large inland lakes is in a curious state in the English law. The public right of navigation in them seems to be recognized, but probably depends upon prescription and proof of long-continued use. But the sovereign and the public are not regarded as having such rights in these lakes as they have in tide-waters. In the case of *Bristow v. Cormican*, L. R. 3 App. C. 641, involving the right of fishery in Lough Neagh, the largest lake in the United Kingdom, Lord Chancellor Cairns said: "The crown has no *de jure* right to the soil or fisheries of a lough like Lough Neagh. . . . I am not aware of any rule which would *prima facie* connect the soil or fishings with the crown, or disconnect them from the private ownership either of the riparian proprietors or other persons." And while the courts do not appear to be willing to apply to such lakes the rule that the riparian proprietor's title extends *usque ad flum aqua*, the public do not seem to be accorded any greater privileges in them than in fresh-water rivers, above the ebb and flow of the tides: *Marshall v. Nollenswater S. N. Co.*, 3 Best & S. 732; *Bloomfield v. Johnston*, 8 L. R. C. L. 68; *Bristow v. Cormican*, 10 L. R. C. L. 396; L. R. 3 App. C. 641.

In this country, even in those states which adhere to the rule of the English common law as to fresh-water rivers, the great inland lakes which are navigable in fact are regarded as public property, and no more susceptible of private ownership than the sea. Riparian proprietors on the great American lakes own only to the water's edge: *Lincoln v. Davis*, 53 Mich. 375; 51 Am. Rep. 116; *State v. Franklin Falls Co.*, 49 N. H. 240; 6 Am. Rep. 513; *State v. Gilmanton*, 9 N. H. 461; *Canal Commissioners v. People*, 5 Wend. 423; *Champlain R. R. Co. v. Valentine*, 19 Barb. 484; *Sloan v. Biemiller*, 34 Ohio St. 492; *Seaman v. Smith*, 24 Ill. 521; *Fletcher v. Phelps*, 28 Vt. 257; *Jakeway v. Barrett*, 38 Vt. 316; *Austin v. Rutland R. R. Co.*, 45 Vt. 215. In the case of *Canal Commissioners v. People*, 5 Wend. 446, Chancellor Worth, referring to the rule of the English common law in reference to navigable fresh-water rivers, said: "The principle itself does not appear to be sufficiently broad to embrace our large fresh-water lakes or inland seas, which are wholly unprovided for by the common law of England. As to these, there is neither flow of the tide or thread of the stream, and our own local law appears to have assigned the shores down to the ordinary low-water mark to the riparian owners, and the beds of the lakes, with the islands therein, to the public." But see *Cobb v. Davenport*, 32 N. J. L. 369, in which it was held that the soil under fresh-water lakes in that state is in

be proprietors, and not in the state, and that it may be acquired by an individual owner by a grant from the council of proprietors. In *Hogg v. Seerman*, 41 Ohio St. 81, 52 Am. Rep. 71, it was held that land under the waters of a navigable bay or harbor on Lake Erie may be held in private ownership, subject to the public rights of navigation and fishery, by title from an express grant made or sanctioned by the general government. In Massachusetts and in Maine, the same rules that have been applied to the Great Lakes are applied to what are termed "Great Ponds": *People's Ice Co. v. Davenport*, 149 Mass. 322; 14 Am. St. Rep. 425; *Gaye v. Seinkrauss*, 131 Mass. 222; *Hittinger v. Eames*, 121 Mass. 539; *Bristol v. Rockport Ice Co.*, 77 Me. 100; *Stevens v. King*, 76 Me. 197; 49 Am. Rep. 609; *Wood v. Kelley*, 30 Me. 47.

RIGHTS OF LITTORAL AND RIPARIAN OWNERS ON NAVIGABLE WATERS. — Having ascertained what waters are deemed navigable in law, we proceed to consider the rights in such waters and in the soil beneath them, possessed by the owners of lands bordering on the shores and banks thereof. Every riparian or littoral proprietor has a right of access to the deep or navigable water in front of his land: *Buckleuch v. Metropolitan Board of Works*, L. R. 5 H. L. 418; *Yates v. Milwaukee*, 10 Wall. 497; *Shirley v. Bishop*, 67 Cal. 543; *Mather v. Chapman*, 40 Conn. 382; 16 Am. Rep. 46; *Clark v. Peckham*, 10 R. I. 35; 14 Am. Rep. 654; *Delaplaine v. Chicago & N. W. R'y Co.*, 42 Wis. 214; 24 Am. Rep. 386. And according to the weight of authority, this right of access is one which, when once vested in the owner, cannot be taken from him without just compensation: *Buckleuch v. Metropolitan Board of Works*, L. R. 5 H. L. 418; *Shirley v. Bishop*, 67 Cal. 543; *Union Depot etc. Co. v. Brunswick*, 31 Minn. 297; 47 Am. Rep. 789; *Clark v. Peckham*, 10 R. I. 35; 14 Am. Rep. 654; *Delaplaine v. Chicago & N. W. R'y Co.*, 42 Wis. 214; 24 Am. Rep. 386; *Gould on Waters*, sec. 150; *Yates v. Milwaukee*, 10 Wall. 497. Mr. Justice Miller, in delivering the opinion of the court in the case last cited, said: "This riparian right is property, and is valuable, and though it must be enjoyed in due subjection to the rights of the public, it cannot be arbitrarily or capriciously destroyed or impaired. It is a right of which, when once vested, the owner can only be deprived in accordance with established law, and, if necessary that it be taken for the public good, upon due compensation." But see, *contra*, *Tomlin v. Dubuque etc. R. R. Co.*, 32 Iowa, 106; 7 Am. Rep. 176; *Stevens v. Paterson & N. R. R. Co.*, 34 N. J. L. 532; 3 Am. Rep. 269; *Gould v. Hudson R. R. Co.*, 6 N. Y. 522. In the case of *Diedrich v. North Western Union R'y Co.*, 42 Wis. 248, 24 Am. Rep. 399, the plaintiff, who owned land on the shore of Lake Michigan, filled in the lake in front of his land, for the sole purpose of extending his possession into the lake, and not for the purpose of protecting his land on the shore, or of constructing a wharf, and it was held that he failed to sustain his title to a part of the land so filled in, which the defendant sought to condemn for a right of way. The right to use the bed of navigable waters beyond the line of low water rests upon the owner's title to the bank or shore, and not upon any title to the bed of such navigable water: *Lake Superior L. Co. v. Emerson*, 38 Minn. 406; 8 Am. St. Rep. 679; *Delaplaine v. Chicago & N. W. R'y Co.*, 42 Wis. 214; 24 Am. Rep. 386; *Diedrich v. North Western Union R'y Co.*, 42 Wis. 248; 24 Am. Rep. 399.

Another right possessed by the littoral or riparian proprietor on navigable waters is the right to extend out to the point of navigability suitable landings, piers, and wharves on and in front of his lands, and he has the right, for this purpose, to occupy exclusively the bed of the waters, subordinate only to the

paramount public right of navigation: *Dutton v. Strong*, 1 Black, 23; *Railroad Co. v. Schurmeir*, 7 Wall. 272; *Yates v. Milwaukee*, 10 Wall. 497; *Atlee v. Packet Co.*, 21 Wall. 389; *Osce v. Toftus*, 33 Fed. Rep. 730; *Coburn v. Ames*, 82 Cal. 385; 28 Am. Rep. 634; *Mather v. Chapman*, 40 Conn. 382; 16 Am. Rep. 46; *Simons v. French*, 25 Conn. 348; *Inhabitants of East Haven v. Hemingway*, 7 Conn. 186; *Chicago v. Laflin*, 49 Ill. 172; *Ehsminger v. People*, 47 Ill. 384; 95 Am. Dec. 495; *Sherlock v. Bainbridge*, 41 Ind. 35; 13 Am. Rep. 302; *Sherlock v. Bainbridge*, 29 Ind. 364; *Musser v. Hershey*, 42 Iowa, 356; *Grant v. Davenport*, 18 Iowa, 179; *Haight v. Keokuk*, 4 Iowa, 199; *Goodsell v. Lawson*, 42 Md. 348; *Hamlin v. Pairpoint Mfg. Co.*, 141 Mass. 51; *Ryan v. Brown*, 16 Mich. 196; *Hanford v. St. Paul & D. R. R. Co.*, 48 Minn. 104; *Union Depot etc. Co. v. Brunswick*, 31 Minn. 297; 47 Am. Rep. 789; *Stevens v. Paterson & N. R. R. Co.*, 34 N. J. L. 532; 3 Am. Rep. 269; *Bell v. Gough*, 23 N. J. L. 624; *Arnold v. Mundy*, 6 N. J. L. 1; 10 Am. Dec. 356; *Parker v. West Coast Packing Co.*, 17 Or. 510; *Clark v. Peckham*, 10 R. I. 35; 14 Am. Rep. 654; *Thornton v. Grant*, 10 R. I. 477; 14 Am. Rep. 701; *Austin v. Rutland R. R. Co.*, 45 Vt. 215; *Alexandria R'y Co. v. Fausce*, 31 Gratt. 781; *Norfolk City v. Cooke*, 27 Gratt. 430; *Diedrich v. North Western U. R'y Co.*, 42 Wis. 248; 24 Am. Rep. 399; *Delaplains v. Chicago & N. W. R'y Co.*, 42 Wis. 214; 24 Am. Rep. 386; *Wisconsin R. I. Co. v. Lyons*, 30 Wis. 61. Some of the cases hold that the owner must not, in exercising this right, carry out his wharf or other improvement beyond the point of navigability, while other cases hold a more liberal doctrine, and permit him to extend his improvements beyond that point, provided he does not interfere with the public right of navigation; *Gould on Waters*, sec. 181.

In New Jersey, it is held that the inchoate right of the riparian proprietor to acquire an exclusive right to the property by wharfing out, or otherwise improving the same, gives him no property in the land while it remains under water: *Stevens v. Paterson etc. R. R. Co.*, 34 N. J. L. 532; 3 Am. Rep. 269. But it is held that by virtue of a local custom, having the force of established law in that state, the adjacency of such proprietor's land to a navigable stream invests him with a license to fill in and wharf out on the public domain in front of his land, to such an extent as does not interfere with public rights; and this license, when executed, becomes irrevocable: *New Jersey & I. Co. v. Morris C. & B. Co.*, 44 N. J. Eq. 396; *Bell v. Gough*, 23 N. J. L. 624.

Whether this right of the riparian owner to wharf or improve out to the point of navigability is a right that can be severed from the abutting land to which it is appurtenant is a question upon which there is a conflict of judicial opinion. Some authorities hold that this right is peculiar to the riparian owner himself, and cannot be the subject of transfer or sale, independently of a conveyance of the land to which the right is appurtenant: *Musser v. Hershey*, 42 Iowa, 356; *Steele v. Saucken*, 72 Iowa, 65; 2 Am. St. Rep. 233; *Lake Superior L. Co. v. Emerson*, 38 Minn. 406; 8 Am. St. Rep. 679. In the case last cited, Gilfillan, C. J., delivering the opinion of the court, said: "The right is incident to the land, — belongs to it by nature. We have not found any case holding that it may be severed from the right to the abutting land, so as to become a right in gross, — one person owning exclusively the shore, and another the riparian right incident to it, though owning no shore. As the owner of the shore has no title to the soil under the water, he can convey nothing in the soil; and as he cannot convey the riparian right severed from the shore, his deed of conveyance of the soil under the water must be inoperative."

In the subsequent case of *Hanford v. St. Paul etc. R. R. Co.*, 43 Minn. 104, the court overruled the decision in *Lake Superior L. Co. v. Emerson*, 38 Minn. 466, 8 Am. St. Rep. 679, and decided that the right to reclaim, improve, and occupy submerged lands out to the point of navigability, although originally incident to the riparian estate, may be separated therefrom, and be transferred to and enjoyed by persons having no interest in the original riparian estate. And it has been elsewhere held that improvements may be severed from the uplands, and held by other persons having no interest in the original tract: *Simons v. French*, 25 Conn. 346; *Goodsell v. Lawson*, 42 Md. 348. But if the owner of a city lot conveys it with the waters of a navigable stream as a boundary, he will not be presumed to have reserved to himself property rights in front of the land conveyed, which he may grant to others for private occupation, or which he may so use himself as to cut off his grantee from the privileges and conveniences which appertain to the shores of navigable waters: *Turner v. Holland*, 65 Mich. 453; *Watson v. Peters*, 26 Mich. 508.

The right of a riparian or littoral proprietor to improve out into the navigable waters in front of his lands is, until actually availed of, subject to the right of the United States to use the soil under the water in aid of navigation,—for the erection of light-houses, for instance,—without making compensation to such proprietor: *Chappell v. Waterworth*, 39 Fed. Rep. 77; *Hill v. United States*, 39 Fed. Rep. 172.

The right of the riparian owner to use and enjoy the improvements made by him in navigable waters fronting on his lands is not, it seems, limited to purposes connected with the actual use of the navigable water, but may extend to any purpose not inconsistent with the public right: *Hanford v. St. Paul & D. & E. R. Co.*, 43 Minn. 104.

The riparian owner on navigable waters has a right of necessity if his land is being, from natural causes, worn away by the water, to intrude into the shallow water near the bank or shore for the construction of works necessary to the protection of his land against the action of the water. But in exercising this right he must not interfere with the public use: *Gould on Waters*, sec. 160; *Diedrich v. North Western Union R'y Co.*, 42 Wis. 348; 24 Am. Rep. 399; *Delaplaine v. Chicago & N. W. R'y Co.*, 42 Wis. 214; 24 Am. Rep. 386; *Gerish v. Clegh*, 48 N. H. 9; 97 Am. Dec. 561.

RIGHTS OF LITTORAL PROPRIETORS TO FLATS. — In Massachusetts, by the colony ordinance of 1647, sometimes referred to as the ordinance of 1641, it was provided that proprietors upon salt waters, where the tide ebbs and flows, should have property to the low-water mark where the sea does not ebb above one hundred rods, and not more than that distance where it ebbs farther, provided such proprietors should not have the right to stop or hinder the passage of boats or vessels to other men's houses or lands. Referring to this ordinance, *Parsons, C. J.*, in delivering the opinion of the court in *Storer v. Freeman*, 6 Mass. 435, 4 Am. Dec. 155, said: "This ordinance was annulled with the charter by the authority of which it was made; but from that time to the present a usage has prevailed which now has force as our common law, that the owner of lands bounded on the sea or salt water shall hold to low-water mark, so that he does not hold more than one hundred rods below high-water mark; but the rights of others are saved agreeably to a provision in the ordinance." This is the established law of Massachusetts and of Maine: *Storer v. Freeman*, 6 Mass. 435; 4 Am. Dec. 155; *Parker v. Smith*, 17 Mass. 413; *Barker v. Bates*, 13 Pick. 255; 23 Am. Dec. 678; *Valentine v. Piper*, 22 Pick. 85; 33 Am. Dec. 715; *Commonwealth v. Alger*, 7 Cush. 53; *Commonwealth v. Reabury*, 9 Gray, 451; *Boston v. Richardson*,

105 Mass. 351; *Emerson v. Taylor*, 9 Greenl. 42; 23 Am. Dec. 531; *Duncan v. Sylvester*, 24 Me. 482; 41 Am. Dec. 400; *Gerrish v. Proprietors of Union Wharf*, 26 Me. 384; 46 Am. Dec. 568; *Pike v. Munroe*, 36 Me. 309; 58 Am. Dec. 751; *Moulton v. Libbey*, 37 Me. 472; 59 Am. Dec. 57; *King v. Young*, 76 Me. 76; 49 Am. Rep. 596; Gould on Waters, sec. 169; 3 Kent's Com. 430. And it is held applicable as a usage in New Hampshire: Gould on Waters, sec. 169; *Clement v. Burns*, 43 N. H. 621. The littoral proprietor may, to the extent of one hundred rods, build solid structures on the flats in front of his land, and thus obstruct the flow and reflow of the tide, provided he does not wholly cut off his neighbor's access to his house or land; and if the coterminous proprietor suffers injury in consequence, it is *damnum absque injuria*: *Davidson v. Boston and Maine R. R. Co.*, 3 Cush. 91; *Boston v. Richardson*, 105 Mass. 365; *Deering v. Long Wharf*, 25 Me. 51.

The owner of these flats may convey them without the uplands, or he may convey the upland without the flats: *Barker v. Bates*, 13 Pick. 255; 23 Am. Dec. 678; *Porter v. Sullivan*, 7 Gray, 447; *Pike v. Munroe*, 36 Me. 309; 58 Am. Dec. 751; *Clancy v. Houdlette*, 39 Me. 451; *Erakine v. Moulton*, 66 Me. 276. And the same rule is applied in Connecticut: *Ladies' S. F. Soc. v. Halstead*, 58 Conn. 144. And although in that state the rights of the littoral proprietor depend upon usage, unaided by ancient statutory provisions, he has the exclusive right to construct wharves upon the flats in front of his land, if he conforms to the regulations imposed by the state, and does not obstruct navigation: *Union Wharf v. Starin*, 45 Conn. 585; *Mather v. Chapman*, 40 Conn. 382; 16 Am. Rep. 48; Gould on Waters, sec. 170.

RIGHT TO ACCRETIONS. — Both the land formed by alluvion, or the gradual and imperceptible accretion from the water, and that gained by reliction, or the gradual and imperceptible recession of the water, belong to the owner of the land to which the addition is made. This subject is considered at length in the note to *Hagan v. Campbell*, 33 Am. Dec. 276-281. In addition to the cases therein cited, see the following: *Welles v. Bailey*, 55 Conn. 292; 3 Am. St. Rep. 48; *Berry v. Snyder*, 3 Bush, 266; *Cook v. City of Burlington*, 30 Iowa, 94; 6 Am. Rep. 649; *Livingston v. County of St. Clair*, 64 Ill. 56; 16 Am. Rep. 516, and note 524.

The title of a riparian or littoral proprietor on navigable waters extends to ordinary high-water mark, and if the line of ordinary high-water mark changes, the line of his land changes with it: *Welles v. Bailey*, 55 Conn. 292; 3 Am. St. Rep. 48; *Steele v. Sanchez*, 72 Iowa, 65; 2 Am. St. Rep. 233.

RIGHT OF RIPARIAN OWNER IS NOT AFFECTED BY REPEAL OF STATUTE declaring a stream navigable: *Steele v. Sanchez*, 72 Iowa, 65; 2 Am. St. Rep. 233; *Chicago etc. R'y Co. v. Porter*, 72 Iowa, 426; *Serrin v. Greffe*, 67 Iowa, 196; *Wood v. Chicago etc. R'y Co.*, 60 Iowa, 456; nor by the enactment of a statute making a river non-navigable: *Wood v. Fowler*, 26 Kan. 682; 40 Am. Rep. 330.

RIPARIAN RIGHTS RECOGNIZED HERE WHICH ARE NOT IN ENGLAND. — The ownership of the beds of navigable waters is in the crown and Parliament in England, and in the public in the United States; for the people of this country, at the Revolution, succeeded to all the rights of the English king and Parliament. But there is a difference between the recognized rights of littoral and riparian owners in this country and those recognized in England. By the common law of England there is no general right, as incident to the ownership of lands abutting on navigable waters, to extend wharves or other improvements beyond the ordinary high-water mark: Gould on Waters, sec. 167. In this country, however, it is different. What-

ever remains after giving to the public the full enjoyment of their rights is recognized as belonging to the riparian or littoral proprietor, and he may do anything upon the land beyond his strict boundary lines, which will not interfere with the public right of navigation: *Burrows v. Gallup*, 32 Conn. 493; 87 Am. Dec. 186; *Groton v. Hurlburt*, 22 Conn. 178; *Prink v. Lawrence*, 20 Conn. 118; *East Haven v. Hemingway*, 7 Conn. 186; *Commonwealth v. Charlestown*, 1 Pick. 180; *Commonwealth v. Alger*, 7 Cush. 53; *Providence S. E. Co. v. Providence S. B. Co.*, 12 R. I. 348; *Alden v. Pinney*, 12 Fla. 348; *Gould on Waters*, sec. 168.

RIGHT OF RIPARIAN OWNER TO ICE ON NAVIGABLE WATERS. — In those states where the beds of navigable streams are held to belong to the state, the riparian proprietor has no right to the ice which forms on the stream, as an incident to his ownership of the adjoining land. The privilege of gathering ice on public waters is a common right, and the ice when gathered belongs to the first appropriator: *Gould on Waters*, sec. 191; *Wood v. Fowler*, 26 Kan. 682; 40 Am. Rep. 330; *Hickey v. Hazard*, 3 Mo. App. 480. This principle is applied in Massachusetts and in Maine to the ice that forms on what are there termed great ponds: *Brastow v. Rockport Ice Co.*, 77 Mo. 100; *Rowell v. Doyle*, 131 Mass. 474; *Gage v. Steinkrauss*, 131 Mass. 222; *Hittinger v. James*, 121 Mass. 539; *Fay v. Salem Aqueduct Co.*, 111 Mass. 27; *Commonwealth v. Vincent*, 108 Mass. 441; *Paine v. Woods*, 108 Mass. 160.

But in those states where it is held that riparian owners take to the middle of streams in which the tide does not ebb and flow, though capable of navigation in fact, the riparian proprietor owns the ice in the river, which forms over his land: *Washington Ice Co. v. Shortall*, 101 Ill. 46; 40 Am. Rep. 196; *Village of Brooklyn v. Smith*, 104 Ill. 429; 44 Am. Rep. 90; *Gould on Waters*, sec. 191; see also *People's Ice Co. v. Steamer Excelsior*, 44 Mich. 239; 38 Am. Rep. 245.

MENAGE v. BURKE.

[43 MINNESOTA, 211.]

MORTGAGE OF REAL ESTATE TO PARTNERSHIP, VALIDITY OF. — A mortgage of real estate given to "Farnham and Lovejoy," of a place designated, is legally sufficient as a mortgage to Sumner W. Farnham and James A. Lovejoy, shown to have been the members of a firm engaged in business at that place under the name of "Farnham and Lovejoy"; and a statutory foreclosure by those persons, under a power of sale contained in the mortgage, is valid, where the only defect suggested is the manner in which the mortgagees are designated in the mortgage.

ACTION to determine adverse claims to real estate. The opinion states the facts.

C. J. Bartleson and P. M. Woodman, for the appellant.

Müller, Young, and Akers, for the respondent.

DICKINSON, J. This is an action to determine adverse claims to real estate. The plaintiff asserted that title was acquired through a foreclosure by advertisement of a mortgage given in

1878, by one Mayo, the owner of the land, to "Farnham and Lovejoy, of the county of Hennepin, state of Minnesota." The mortgagees thus designated were the members of a business partnership, their full names being Sumner W. Farnham and James A. Lovejoy; and the mortgage was given to secure an indebtedness of the mortgagor to that firm. The mortgage contained the usual power of sale in favor of the parties of the second part. On default the mortgage was foreclosed, in 1880, by the exercise of that power. The notice of sale, describing the mortgage as given to "Farnham and Lovejoy," contained in parenthesis, immediately following that designation of the mortgagees, the full names of the parties as above given. It was subscribed, "Farnham and Lovejoy, mortgagees," and further, "Boardman and Ferguson, attorneys for mortgagees." The sale was made to "Sumner W. Farnham and James A. Lovejoy." No redemption was made, and the plaintiff has acquired whatever title those purchasers secured through this mortgage and foreclosure. The defendant claims title under a sale of the same land, in 1889, under execution upon a judgment recovered against Mayo, the mortgagor, in 1879, subsequent to the recording of the mortgage. We are to decide the question of the legal validity of the mortgage and the statutory foreclosure, in respect to which the only defect suggested is from the manner in which the mortgagees are designated in the mortgage.

From the findings of the court it appears that when the mortgage was given, and when it was foreclosed, Sumner W. Farnham and James A. Lovejoy were partners engaged in business under the firm name of Farnham and Lovejoy; that Mayo, in the course of business transactions with that firm, became indebted to them in the sum of four thousand dollars; and that he gave this mortgage to them to secure the payment of that debt. There have been several decisions of this court in which has been considered the legal effect of deeds and mortgages of real estate in which a mere partnership name or the name of an association had been given as the grantee: *German Land Ass'n v. Scholler*, 10 Minn. 260, 331; *Morrison v. Mendenhall*, 18 Minn. 212, 232; *Tidd v. Rines*, 26 Minn. 201; *Gille v. Hunt*, 35 Minn. 357; *Foster v. Johnson*, 39 Minn. 378. And see *Kellogg v. Olson*, 34 Minn. 103; *Townshend v. Goodfellow*, 40 Minn. 312; 12 Am. St. Rep. 736. The general doctrine there expressed as to the insufficiency of such an instrument, unaided by a court of equity, to

transfer a legal title, has been declared to be subject to the qualification that where the partnership name thus employed contains the name or names of one or more of the partners, the instrument will have legal effect as a conveyance or mortgage to the partner or partners thus named: *Gille v. Hunt*, 35 Minn. 357; *Foster v. Johnson*, 39 Minn. 378; *Morse v. Carpenter*, 19 Vt. 613; *Beaman v. Whitney*, 20 Me. 413; *Sherry v. Gilmore*, 58 Wis. 324; *Jones v. Neale*, 2 Pat. & H. 339. This controls the decision of this case. While it is necessary to the legal validity of such instruments that there be a grantee having a legal existence, capable of taking, and certainly designated, or so designated that his identity can be certainly ascertained, these conditions are complied with in this case; resort being had, as may be done, to facts beyond the instrument, for the purpose of applying the description or designation of the persons named to the persons so described: *Wakefield v. Brown*, 38 Minn. 361; 8 Am. St. Rep. 671; *Morse v. Carpenter*, 19 Vt. 613. By this means it was ascertained that the "Farnham" and "Lovejoy," "of the county of Hennepin and state of Minnesota," named in the mortgage as the "parties of the second part," were the persons of those names who were the members of the business copartnership of Farnham and Lovejoy, that is, Sumner W. Farnham and James A. Lovejoy. With this light thrown upon the instrument, it is most reasonable to construe it as made to the two persons thus named, and not merely to the partnership in the sense of the business relation existing between those persons. Our conclusion is, that the mortgage was effectual in law, and that the statutory foreclosure by the exercise of the power of sale was valid.

Judgment reversed, and judgment directed for the plaintiff.

PARTNERSHIP — CONVEYANCES TO PARTNERSHIP, USING THE FIRM NAME TO DESIGNATE THE GRANTEE. — A conveyance to A B & Co. operates to invest A B with the entire interest conveyed: *Winter v. Stock*, 29 Cal. 407; 39 Am. Dec. 57; *Moreau v. Saffarans*, 3 Sneed, 595; 67 Am. Dec. 582. In *Kelley v. Bourne*, 15 Or. 476, a deed made to the Grant's Pass Real Estate Association was decided to vest in the partners composing the association such an equitable interest as to convert the property therein conveyed into partnership property.

WILKINS v. BEVIER.

[43 MINNESOTA, 212.]

POSSESSION BY TENANT NOTICE TO JUDGMENT CREDITOR OF WHAT.—Where a judgment creditor asserts a lien upon real estate actually occupied by a third party as a tenant of the judgment debtor, at the time of the docketing of the judgment, he is charged with constructive notice of all the occupant's rights and interests, and he is also affected with like notice of title in the occupant's landlord.

JUDGMENT CREDITOR NOT CHARGED WITH NOTICE OF UNRECORDED DEED FROM JUDGMENT DEBTOR.—A judgment creditor is not charged with notice that the judgment debtor, who is the lessor of real estate, the title to which appears of record in his name at the time of the docketing of the judgment, has conveyed the property to another person, although the latter has informed the tenant that he has a deed from the debtor. The law, in such case, holds the judgment creditor to have had notice only of such facts as inquiry would naturally lead to, not of such facts as it might possibly lead to.

ACTION to remove a cloud from the title to a lot of land. The opinion states the case.

McGindley and Cotton, for the appellant.

White and Reynolds, for the respondent.

COLLINS, J. Action to remove a cloud from the title which plaintiff claims to have to a lot in the city of Duluth. About the 1st of August, 1886, one Austin was the owner in fee of the lot in question. He then entered into a verbal contract with the plaintiff to sell and convey the lot to him for a certain sum, part of which was to be paid in professional services, the balance in cash. These services were rendered, and on October 23d of the same year said Austin made and executed a warranty deed of the premises, in which plaintiff was named as grantee; but he refused to deliver said deed to the plaintiff until the latter paid to him the balance of the purchase-money. This was done, the last payment being on March 27, 1888, at which time the deed was duly delivered to plaintiff. The latter had been acting as agent and attorney for Austin, who died November 7, 1888, for some two years prior to his decease. The lot in question, during all of the period of time covered by these transactions, was vacant and unoccupied, except a small portion in the rear, on which had been erected a brick building owned and occupied by one Buchanan, who had leased the ground from year to year from Austin. In November, 1887, his lease being about to expire, the tenant applied to plaintiff, as Austin's agent, for a re-

newal; and thereupon there was executed by Austin a lease of the ground actually covered by the building, for one year, commencing November 15, 1887. This lease was witnessed by plaintiff, and Austin's acknowledgment thereto was taken before him as a notary public. At the same time Buchanan paid to plaintiff, for Austin, as he supposed, the rent in full for one year; that is, up to November 15, 1888. This lease was not recorded, and the plaintiff failed and neglected to put his deed on record until the twenty-eighth day of June, 1888. Long before this, suits had been brought against Austin in the district court of the county in which the lot is situated, and in which all of these parties then resided, for the recovery of money, in one of which this defendant was plaintiff. This plaintiff appeared in that action as Austin's attorney, and on March 31, 1888, verified his client's answer therein. Judgment was entered and docketed against Austin, defendant in said action, on May 24, 1888, more than one month before plaintiff's deed was recorded. The court below found that there was no good or sufficient reason for plaintiff's failure and neglect to put his deed on record until after the judgment was docketed; that at the time of the docketing, this defendant, judgment creditor, had no knowledge of plaintiff's claim to the lot; that he then knew the record title to be in the judgment debtor, Austin, and also knew that upon the rear end of the premises there was the building before mentioned; and also found that "in the spring or summer of 1888 this plaintiff informed the tenant, Buchanan, that he had purchased the lot, and had a deed therefor, and that between the fifteenth and twenty-fifth days of June, same year, the creditor inquired of Buchanan, and by him was informed that the building was his own, but that he leased the ground upon which it stood from Austin."

The defendant's claim is based solely upon his purchase at a sale on execution issued for the purpose of enforcing the payment of the judgment heretofore described. Therefore both parties assert a title derived from Austin, — the plaintiff through his deed of conveyance, the defendant by means of proceedings upon his judgment. The principal question in the case is, whether the latter had such notice of the plaintiff's rights and interests at the time of the docketing of his judgment as would render it subject and secondary to the unrecorded conveyance. If he was possessed of this notice, the defendant's purchase and the sheriff's certificate of sale, as evidence of a paramount title, cannot be allowed to prevail as

against the plaintiff's deed. He was not a purchaser in good faith and without notice: *Lamberton v. Merchants' Nat. Bank*, 24 Minn. 281, 287. It will be observed that constructive notice only can be urged or is claimed by the appellant; and this arises, if at all, by reason of the actual, visible occupation by Buchanan of a portion of the premises at the time of the docketing of the judgment. The doctrine is well established in this state that a purchaser, by means of the tenant's possession, is put upon inquiry respecting the particulars of his claim and interest, and also from whom he holds; that the actual possession by a tenant not only protects him in all of his rights and interests, but that a purchaser is affected with like notice of title in the occupant's landlord: *Morrison v. March*, 4 Minn. 325, 422; *Groff v. Ramsey*, 19 Minn. 24, 44. This is the doctrine found in the greater number of American cases: 2 Pomeroy's Eq. Jur., sec. 618. A more restricted rule, which prevails in England, has been adopted in some of our states: *Beatie v. Butler*, 21 Mo. 313; 64 Am. Dec. 234; *Flagg v. Mann*, 2 Sum. 486, 557; *King v. Paulk*, 85 Ala. 186; *Veazie v. Parker*, 23 Me. 170. The case last mentioned was cited with approval in *Roberts v. Grace*, 16 Minn. 115, 126, upon the proposition that even an attornment to the grantee, of a tenant holding under the grantor, would not supply the want of registry, because there was no visible change of possession to indicate that there had been a change of title. The point, however, to which the remark was applicable was not involved in the determination of the Roberts case.

This brings us to a consideration of the relations which existed between appellant and Buchanan, when respondent's judgment was docketed, and what facts the latter might have learned, had he then pursued such inquiries as to Buchanan's claims as the law required. His investigations must be made at the time of the docketing of the judgment; and he will be held, in the absence of inquiries, as having knowledge of what he could have then learned. Therefore, it is quite immaterial, in this case, that Bevier, the judgment creditor, was permitted to testify that a few days subsequent to the entry of the judgment he inquired of Buchanan, the tenant, and was informed by him that he leased from Austin; and equally as immaterial that the trial court passed upon this in its findings of fact. The admission of the testimony, and the finding thereon, did not prejudice the appellant, because the

rights of the respondent must be determined by what he knew, or might have learned upon proper inquiry, at the time his judgment was docketed. The lien of the judgment could not be impaired or aided by subsequently acquired knowledge as to the tenant's interest or his landlord's title. From the findings it appears that "in the spring or early summer of 1888" the appellant notified Buchanan of his purchase from Austin, and that he had a deed of the premises. This is indefinite, and no effort was made in the court below to have the finding made more exact as to the time. But this is of no practical consequence; for we shall assume, while considering the question, that this information was imparted, as appellant claims, shortly after March 27th, when he received his deed, and antecedent to the 24th of May, the day of the docketing of the judgment. For several years, Buchanan, the tenant, had held from year to year under a lease from Austin, the judgment debtor; and for some time, at least, Wilkins, the appellant, had been the landlord's agent in respect to the leased property. This was well known to the tenant when he, in November, 1887, applied to the agent for a renewal of his lease; and he then paid one year's rent in advance to Wilkins, for Austin, as he supposed. A lease for the year ending November 15, 1888, was then signed by Austin, witnessed by the appellant, who also, as a notary, took and certified to Austin's acknowledgment thereof. It was under this lease, with the rent fully paid in advance for the term, that Buchanan held when the judgment was docketed. The tenant was notified by the appellant that he had succeeded by deed to Austin's title; but there is nothing in the record to show that at any time prior to the expiration of the term covered by the lease, or in any manner, Buchanan recognized or acknowledged appellant as his landlord. He did not expressly attorn, nor did he pay rent to appellant as the owner, and thus attorn by implication. At no time was the tenant in a position where he could not have been permitted, had occasion arisen, to deny, and to have put appellant upon proof of, his alleged title, although by virtue of the conveyance, appellant secured Austin's title to the property as well as his rights in the written lease, including such as might arise by reason of the tenant's covenants, if any there were. This, of itself, did not constitute him the landlord.

Now, with this condition of affairs, was Buchanan's possession notice to the judgment creditor of the title now asserted

by the appellant? Admitting it to have been the creditor's duty to have followed up the suggestion which the occupancy of the premises by a third party implied, to have investigated Buchanan's claims, and that he must be presumed to know all the facts which inquiry would have developed, all that he might have learned had he interrogated Buchanan, what knowledge would he have acquired, in the natural course of events? and what must be charged with as in his reach, had he attempted to obtain it? Certainly, he would have been told that Buchanan owned the building, and had leased the ground on which it stood, for the year ending November 15th, following. The tenant's interest would have been defined by this answer, but the pursuit of information as to the actual title could not safely stop at this point. It would be incumbent upon the creditor to ascertain from whom he leased. To a verbal inquiry Buchanan's answer would have been, naturally and truthfully, that he leased from Austin; or had the creditor called for the written lease, he would have learned precisely the same thing. It would seem plain that the law cannot require further or other inquiries, or hold the creditor as having knowledge, and therefore constructive notice, of facts which these inquiries might possibly, but not naturally, lead to; such, for instance, as a disclosure that the lessor, the judgment debtor, in whose name the title to the property appears of record, has very recently sold to another person. It would also seem plain that no more should be required of the creditor than that he inspect the lease, or by verbal inquiry obtain information as to who may have executed it, and therefore assumed to have interests in the demised premises; failing so to do, that he be charged with the knowledge which he would have thus obtained. It is possible that, in the course of the conversation with Buchanan in respect to his rights in the premises, he would have informed the respondent of the sale and conveyance to appellant; but the conclusion is inevitable that such would not have been the natural or ordinary result of pertinent inquiries upon the subject, and obviously, an inspection of the lease under which the tenant occupied would not have conveyed the slightest intimation of appellant's claim.

Of the seventh assignment of error we need but to say that if the judgment herein involved was not against the person in whose name the title to the lot appeared of record prior to the recording of appellant's deed, the latter cannot be allowed to

maintain the action: *Coles v. Berryhill*, 37 Minn. 56. It was only upon the assumption that the title of record was in Austin at the time of the docketing that the suit was brought, tried, or determined.

Judgment affirmed.

POSSESSION OF TENANT AS NOTICE. — The possession of a tenant is notice to a subsequent purchaser of the landlord's unrecorded deed: *Lery v. Holberg*, 67 Miss. 526; *Morrison v. Kelly*, 22 Ill. 610; 74 Am. Dec. 169; or of an unrecorded lease: *Dreyfus v. Hirt*, 82 Cal. 621. But knowledge by a subsequent purchaser that a person in possession is the tenant at sufferance of his vendor is not sufficient to charge such purchaser with actual notice of a prior purchase by such tenant: *Vaughn v. Tracy*, 25 Mo. 318; 69 Am. Dec. 471. Nor is the possession by a mortgagor's tenant notice to a purchaser of an unrecorded agreement between the mortgagor and mortgagees postponing the sale under the mortgage: *Beatie v. Butler*, 21 Mo. 313; 64 Am. Dec. 234, and note 241, 242, as to the effect of possession as notice of an unrecorded instrument. See also *Riley v. Quigley*, 50 Ill. 304; 99 Am. Dec. 516, and note; *Rorer Iron Co. v. Trout*, 83 Va. 397; 5 Am. St. Rep. 285, and note.

UNRECORDED INSTRUMENTS — RIGHTS OF JUDGMENT CREDITOR. — The lien of a judgment is preferred to a prior unrecorded mortgage: *Manufacturers' etc. Bank v. Bank of Pa.*, 7 Watts & S. 335; 42 Am. Dec. 240; or even a prior unrecorded deed: *Reed v. Austin*, 9 Mo. 722; 45 Am. Dec. 336, and note. But a creditor having actual notice of a prior unrecorded conveyance by his debtor, for a valuable consideration, cannot by an attachment and levy obtain title thereto against the grantee: *Prest v. Rice*, 1 Pick. 164; 11 Am. Dec. 156.

BLOOM v. MOY.

[43 MINNESOTA, 397.]

JUDGMENT CREDITOR MUST PROVE EXISTENCE OF DEBT AT TIME OF CONVEYANCE SOUGHT TO BE SET ASIDE AS FRAUDULENT. — When a judgment creditor brings an action to set aside, as fraudulent as to creditors, a conveyance of real estate made by the debtor prior to the judgment, he must show that the debt for which the judgment was rendered existed at the time of the conveyance. And the judgment, as against the grantee, does not prove such existence.

ACTION brought by the plaintiff, a judgment creditor of Samuel Moy, to set aside, as fraudulent, a conveyance from that defendant to the other defendant, Fritz Moy. A dismissal was ordered at the close of the plaintiff's case. A new trial was refused, and the plaintiff appealed.

Odell and Steidl, for the appellant.

H. J. Peck, for the respondents.

GILFILLAN, C. J. The action was properly dismissed. When a judgment creditor, or one claiming through the judgment, brings an action to set aside, as fraudulent as to creditors, a conveyance of real estate by the judgment debtor prior to the judgment, he must show that the debt for which the judgment was rendered existed at the time of the conveyance. The judgment does not, as against strangers to it, prove the antecedent existence of the debt for which it was rendered: *Bruggerman v. Hoerr*, 7 Minn. 264, 337; 82 Am. Dec. 97; *Braley v. Byrnes*, 20 Minn. 389, 435; *County of Olmsted v. Barber*, 31 Minn. 256; *Hartman v. Weiland*, 36 Minn. 228. The plaintiff did not prove that the debt existed at the time of the conveyance. He attempted it, perhaps, by showing that a bill or claim of plaintiff against the judgment debtor was presented to the latter prior to the conveyance. Without deciding whether what the latter said at the time would have been evidence to prove, as against this defendant, the existence of the debt, it is enough to say that there was no evidence of the identity of the claim thus presented with the one on which the judgment was recovered. As plaintiff's action had to fail for absence of the proof mentioned, it was not material that evidence offered of a fraudulent intent was excluded. The admission of it would not have affected the result.

Order affirmed.

FRAUDULENT CONVEYANCES, JUDGMENT CREDITORS SEEKING TO SET ASIDE. — Creditors seeking to have a conveyance, executed by their debtor, set aside as fraudulent, must prove their debts: *Sanford etc. Co. v. Wiggin*, 14 N. H. 441; 40 Am. Dec. 198; which may be done by producing the judgments obtained against the debtor: *Note to Massery v. Gorton*, 90 Am. Dec. 299; *Schley v. Dixon*, 24 Ga. 278; 71 Am. Dec. 121; *Logan v. Logan*, 22 Fla. 561; 1 Am. St. Rep. 212. The judgment itself must be produced, not mere copies of the execution: *Sharp v. Wickliffe*, 3 Litt. 10; 14 Am. Dec. 87. In the case of *Bruggerman v. Hoerr*, 7 Minn. 337, 82 Am. Dec. 97, it is decided that one who is a party may go behind a judgment in an action by a judgment creditor to set aside conveyances of his debtor's realty as fraudulent, and may inquire as to the validity of the indebtedness upon which it is based, as well as whether or not the indebtedness really existed at the time the alleged fraudulent conveyances were made.

BURE v. SEYMOUR.

[43 MINNESOTA, 401.]

COURT ACQUIRES JURISDICTION BY FACT OF SERVICE OF SUMMONS BY PUBLICATION, and not from the proof of it filed.

AMENDMENT OF AFFIDAVIT OF SERVICE BY PUBLICATION. — Where a judgment by default has been rendered against a defendant served by publication of summons, upon an affidavit which fails to show a sufficient publication, if the summons was in fact duly published, the plaintiff may file, *nunc pro tunc*, a proper and sufficient affidavit of publication, provided it does not appear that it would be unjust to the defendant, or injuriously affect the rights of third parties.

THE opinion states the case.

W. S. McClenahan, for the appellant.

White and Reynolds, for the respondent.

GILFILLAN, C. J. This action was commenced against a non-resident defendant by publication of the summons, and judgment was entered against him by default. The affidavit of publication of the summons filed with the clerk for entry of judgment did not show a sufficient publication. Defendant, appearing specially for that purpose, moved to set aside the judgment on that ground. The plaintiff at the same time moved for leave to file, *nunc pro tunc*, a proper and sufficient affidavit of publication. The motions were heard at the same time, and by the same order the first motion was granted and the second denied. On the motions, the plaintiff showed that the defect in the affidavit of publication filed occurred through mistake and inadvertence, and that due publication was in fact made. Except on these facts, neither party invoked, and neither made any case calling into exercise, the discretion of the court. By the record, the judgment appeared to be void: *Godfrey v. Valentine*, 39 Minn. 336; 12 Am. St. Rep. 657. And unless it should be corrected so as to show proper publication, and so as to make the record show a valid judgment, the defendant had a right to have it vacated; that is, the defendant (there being no question of laches in respect to making the motions in the case) was entitled to the relief he sought, unless the plaintiff's motion ought to have been granted; in which case, of course, defendant's motion could not prevail.

The question is, then, Was the plaintiff entitled, under the facts appearing, to have the record corrected so as to show the

fact as it actually was? We think he was. The jurisdiction of the court was acquired by the fact of service, and not from the proof of it filed: *Kipp v. Fullerton*, 4 Minn. 366, 473; *Commissioners of Mille Lacs Co. v. Morrison*, 22 Minn. 178. So that as soon as the summons was duly published, the jurisdiction over the cause was complete, though no affidavit of publication had been made. And we may say here that, were this judgment set aside, the plaintiff could at once file proper proof of publication, and as the time for defendant to answer had expired, the same judgment might immediately be entered. The plaintiff was in the same position when the judgment was entered. He was entitled to the judgment. By reason of the mistake or inadvertence in the matter of the affidavit of publication filed, he failed to secure a judgment valid upon the record, but which would be valid if the fact as it was in respect to the publication had been made to appear in the record. The power of the court to amend the record in such a case cannot be doubted: Gen. Stats. 1878, c. 66, secs. 124, 125. It is a power given to be exercised in the furtherance of justice. Of course, if, since the entry of such a judgment, circumstances have arisen that would make it unjust to the defendant, or if rights of third parties have intervened so that the amendment might operate as fraud upon them, it ought not to be allowed. A party ought not to be relieved, at the expense of others, from the consequences of his own mistake or inadvertence. If any one must suffer from it, he, and not other innocent persons, should be the sufferer. But where, as in this case, there is only the bare fact that, in a cause of which the court had complete jurisdiction, the party has failed, through mistake, to secure what he was of right entitled to, we think the statute intends that the omission or mistake shall be corrected. If not a matter of strict right in such a case, sound discretion should grant the relief. We do not mean that defects in jurisdiction, mistakes or omissions that prevent the jurisdiction attaching, may be cured *nunc pro tunc*; and we suspect that in refusing the relief the court below had not in view that, notwithstanding the defect in the affidavit of publication, the court had full jurisdiction of the cause, and when the judgment was entered the plaintiff was entitled to it.

Order reversed, and the court below will enter an order refusing defendant's and granting plaintiff's motion.

SERVICE BY PUBLICATION — AMENDED AFFIDAVIT. — Amended affidavits of service of summons by publication may be received by the court after judgment has been rendered in an action for divorce, and before the roll has been made up: *Newman's Estate*, 75 Cal. 213; 7 Am. St. Rep. 146. An amended affidavit of the publication of a summons may be filed in support of a judgment, where it appears that the corrected affidavit is true, and establishes a compliance with the law and the order of the court directing the publication; and after being so filed, the amended affidavit may even be transmitted to the appellate court: *Friak v. Reigelman*, 75 Wis. 499; 17 Am. St. Rep. 198.

MOORE v. NORMAN.

[43 MINNESOTA, 428.]

TENDER OF AMOUNT OF DEBT SECURED BY CHATTEL MORTGAGE AFTER MATURITY, EFFECT OF. — The effect of a tender of the amount of a debt secured by a chattel mortgage, though made after maturity, is to extinguish and discharge the lien of the mortgage; and in an action thereafter brought by the mortgagee to obtain possession of the chattels mortgaged, it is not necessary to keep the tender good by depositing the money in court. But in such case the proof should be clear that the tender was fairly made, deliberately and intentionally refused by the mortgagee, that sufficient opportunity was afforded to ascertain the amount due, and that a sum sufficient to cover the whole amount due was absolutely and unconditionally tendered.

ACTION OF claim and delivery. The opinion states the case.

George W. Wilson, for the appellant.

T. J. Knox, for the respondent.

COLLINS, J. Action of claim and delivery, brought by a mortgagee against a mortgagor, to recover possession of certain domestic animals. Mortgages had been given upon distinct property to secure separate notes. By the verdict of the jury, the animals described in one of these mortgages were awarded to plaintiff, while those covered by the other were held to belong to defendant. Under the charge of the court, this conclusion must have been reached by determining that one of the notes was tainted with usury, and hence the mortgage securing it invalid, while the other was not. By this charge there was excluded from the consideration of the jury all testimony in reference to tenders made by the defendant mortgagor after he had defaulted in his payments, and just prior to the commencement of this action. In substance, this testimony was that defendant, in due form, had twice tendered to plaintiff, in payment of his notes, a sum of money

differing in amount each time, and that on each occasion the tender had been rejected; and that he had thereafter retained the money so tendered, in his possession, ready for the plaintiff should it be called for, until after the property in dispute had been sold upon a foreclosure of the mortgages. The fact of these tenders, and the amount of each, seems undisputed, the real difference between the parties being as to the balance then remaining due and unpaid upon the defendant's notes. The sole reason given by plaintiff for refusing to accept the money offered by defendant was, that it was insufficient in amount. The defendant in his answer averred a readiness to pay the balance which he admitted and alleged to be due on his notes, and averred, further, that he brought this sum into court for plaintiff, but there was no actual deposit or offer to deposit the amount in court. Upon the other hand, the testimony, as before stated, showed that the money was kept by defendant but a few days, until the property was sold on foreclosure. The position of the court below, taken upon the trial, and also when it refused to allow the motion appealed from, was, that the defendant should have kept his tender good by bringing the money into court for payment to the plaintiff, should it have been determined by the jury that it was sufficient in amount.

The question before us — the effect of a tender made subsequent to default in the conditions of a mortgage — has never been presented to this court. In *Bulma v. Wambaugh*, 16 Minn. 106, 116, it was assumed, expressly for the purposes of a consideration of that case, that a sufficient tender of the debt on the law day, and a refusal to accept, discharged the lien of a mortgage upon real property, although the tender was not kept good. The subject of tender, in case of a debt secured by chattel mortgage, was also referred to in *Coffin v. Reynolds*, 21 Minn. 456; *Ferguson v. Hogan*, 25 Minn. 135; *Norton v. Baxter*, 41 Minn. 146; 16 Am. St. Rep. 679; *Reisan v. Mott*, 42 Minn. 49; 18 Am. St. Rep. 489. But the necessity of keeping the tender good by payment of the money into court when the mortgagee, refusing, after condition broken, to accept it, commences a possessory action for the mortgaged property, is now the question to be determined.

At common law, where it was held that a mortgage upon real property was a grant of the land defeasible only on the condition subsequent of paying the money at the exact time specified (on the "law day" as it was then

termed), it was well settled that a tender and refusal upon the law day extinguished the lien of the mortgage, although the debt remained. But in case the money was not tendered when due, upon the exact day, the estate vested absolutely in the mortgagee. Even payment and acceptance thereafter did not re-vest the estate in the mortgagor without a reconveyance from the mortgagee. In case of a tender and refusal after maturity of the debt, the lien was not extinguished, nor the character of the mortgagee's estate changed. The mortgagor's only remedy was in equity, by a bill to redeem. It was settled at an early day in the state of New York, in opposition to the ancient doctrine, that a mortgage upon real property was a mere security or pledge of the land covered by it for the money borrowed or mentioned in it; that the mortgagor remained the owner of the estate, entitled to its possession until divested by foreclosure; and that an acceptance of the amount due on the mortgage, at any time prior to a foreclosure, discharged the encumbrance on the land, precisely as an acceptance of the amount for which personal property was held discharged the pledge. With this view of the law in regard to real-estate mortgages came the contention that no sound distinction could longer be maintained between a tender and refusal upon the due or law day, and a tender and refusal upon any day thereafter, prior to foreclosure; and in *Kortright v. Cady*, 21 N. Y. 343, it was held that a tender of the money due on a real property mortgage, at any time before foreclosure, — though made after the law day, and not kept good, — extinguished and discharged the mortgage lien. This doctrine in regard to real property mortgages has been steadily adhered to in the state of New York, and with the common law correctly stated, as it has been, in respect to the sweeping effect of a tender made upon due-day, it is difficult to see what distinction can now be suggested, when considering the force and effect of a tender made upon the law day and one made thereafter. We are positive none can be pointed out which possesses any real merit. And the doctrine announced in the *Kortright* case has been adopted elsewhere, without regard to the character of the security, whether real or personal: *Flanders v. Chamberlain*, 24 Mich. 305; *Bartel v. Lope*, 6 Or. 321. But in *Noyes v. Wyckoff*, 30 Hun, 466, it was held inapplicable in the case of a chattel mortgage, because of the difference in structure and effect between such a security and a mortgage upon real estate; the latter being a lien only,

and conveying no title to the land, while the former transferred the title at once, subject to a defeasance by performance of the conditions annexed, the payment of the debt. On appeal, this case was affirmed on another point: *Noyes v. Wyckoff*, 114 N. Y. 204.

The character of the real estate mortgage, and the *status* of the lands covered thereby, are the same in this state under our statutes as they were declared to be by the courts of New York many years ago, while the same distinction between chattel mortgages and those upon real property exists here as it does there; for it has been announced repeatedly in the decisions of this court that the former vests in the mortgagee a defeasible title in the mortgaged property, and upon default he is entitled to possession without foreclosure, unless stipulated to the contrary, subject to the mortgagor's right of redemption. There has been of late years considerable legislation upon the subject of chattel mortgages, with a view to guarding and protecting the rights and interests of the mortgagor. Although technically the legal title to the mortgaged property is vested in the mortgagee, he has been deprived of many of the rights which formerly resulted from that rule of law. He cannot arbitrarily and unreasonably take possession of the chattels prior to the time the mortgagor is in default in his payments. Unless power to sell is granted by the mortgage, a foreclosure thereof must be made by service of a notice of intent to foreclose, the foreclosure becoming complete at the expiration of sixty days, and pending these proceedings it does not seem to be absolutely essential that possession should be taken by the mortgagee. If by the terms of the mortgage a sale be authorized as a method of foreclosure, it must be public, and after due notice as prescribed by the statute. Until the foreclosure is complete, either by service of the notice of intention to foreclose and the expiration of the period of sixty days thereafter, or by a public sale of the property under the terms of the mortgage, the right to redeem is fully recognized and protected. If the mortgagee has reduced the possession to himself, a tender before actual sale, and a refusal to accept the amount due, with costs, if any there be, confers upon the mortgagor the right to maintain replevin or claim and delivery for the property. Now, all of these salutary provisions of the statutes (Gen. Stats. 1878, c. 39; Laws 1879, c. 65; Laws 1885, c. 171) have had a practical effect upon the rule of law that the legal title to the mortgaged chattels vests in the mortgagee, and

that he is entitled to possession thereof upon default of the annexed conditions. It still exists, and for obvious reasons, not apparent in cases where real property has been mortgaged, will continue to exist. But in truth very little difference can be pointed out between the rights, privileges, and remedies of the mortgagor of real and personal property, either in the structure of the mortgage or its effect. As against third parties, one must be filed, the other put upon record; as to either, redemption may be made after default, upon payment of the debt secured thereby within a specified interval of time, denominated, in each case, a "period for redemption." The same kind of an instrument, a certificate in writing (executed with more formality in case the security is upon real than if it be upon personal property), releases and discharges either. The distinction is therefore more in theory than in practice. If this be so, why should a different effect be given a tender made of the amount of a debt in the one case than in the other? We can discover no reason for a distinction which commends itself, and no reason is suggested in the decisions cited by respondent, except that based upon the technicality before referred to, that a mortgage upon real estate is a mere lien, while a mortgage on personal property vests the legal title thereof in the mortgagee. This is not satisfactory, and, in analogy with the rule laid down in case of real estate security, which is well supported on principle and by authority, we are of the opinion that the effect of a tender of the amount of a debt secured by a chattel mortgage, though made after maturity, is to extinguish and discharge the lien, the debt only remaining; and that it is not necessary to keep the tender good by depositing the money in court, in case an action is thereafter brought by the mortgagee to obtain possession of the chattels.

It is urged in some of the cases, where a different conclusion has been reached, that the adoption of this rule must work great hardship and injustice to the mortgagee, frequently causing a loss of the entire debt; but certainly, in this respect, the rule will not be more unjust when invoked as to chattel than when governing a real property mortgage, or than when it is applied, as it always has been without hesitation, in the case of a pledge: See *Norton v. Baxter*, 41 Minn. 146; 16 Am. St. Rep. 679, and cases cited. As was said in the *Kortright* case, it is not perceived how the mortgagee is to be embarrassed by the establishment of this rule. If the mort-

gagor does not tender the full amount due, the lien of the mortgage is not extinguished, and he runs no risk in accepting it. If, upon the other hand, it is sufficient in amount, his debt is paid, and that is all he has any right to demand. It is his own folly if he attempts to exact more. But in view of the serious consequences which might possibly result from a refusal to accept such a tender, the proof should be clear that it was fairly made, deliberately and intentionally refused by the mortgagee, that sufficient opportunity was afforded to ascertain the amount due, and that a sum sufficient to cover the whole amount due was absolutely and unconditionally tendered: *Tuthill v. Morris*, 81 N. Y. 94. See also, upon the sufficiency of a tender, *Storey v. Krewson*, 55 Ind. 397; *Wilder v. Seelye*, 8 Barb. 408; *Ocean Nat. Bank v. Fant*, 50 N. Y. 474; *Nelson v. Robson*, 17 Minn. 260, 284. As the character of the tender, whether conditional or otherwise, and its sufficiency as to amount, should have been submitted to the jury, under proper instructions, the trial court erred in its ruling, and a new trial must be had.

Order reversed.

TENDER — DISCHARGE OF LIEN. — A mechanic's lien is discharged by a sufficient tender, and the employer in bringing replevin for his property is not bound, in order to keep his tender good, to bring the money into court: *Mognahan v. Moore*, 9 Mich. 9; 77 Am. Dec. 469, and note to same, in which it is said that a tender of the amount of a debt secured by a mortgage extinguishes the lien of the mortgage; and after the tender, trover or replevin may be brought for the property; and it is not necessary to keep the tender good. At common law, the tender of a mortgage debt, made after the maturity of the debt, must be kept good, to be availing: *Tompkins v. Batie*, 11 Neb. 147; 38 Am. Rep. 361; *Crain v. McGoon*, 86 Ill. 431; 29 Am. Rep. 37, and note 41-43; compare *Loughborough v. McNewin*, 74 Cal. 250; 5 Am. St. Rep. 435.

PETERS AND WIFE v. TUNELL.

[48 MINNESOTA, 473.]

VENDOR'S LIEN DOES NOT ARISE ON SALE OF BOTH REAL AND PERSONAL PROPERTY WHEN. — A vendor's lien does not arise from the sale of both real and personal property for one entire sum or consideration, where no distinct price is set upon the real property. Nor is the vendor of real property entitled to an implied equitable lien to secure the performance of the consideration when that is of such a nature that the court cannot accurately ascertain and define the amount of the charge to be imposed upon the land and enforced out of it, as where the consideration is an agreement to support the grantor during life.

THE opinion states the case.

John Whytock, for the appellants.

Eustis and Morgan, for the respondents.

DICKINSON, J. This is an appeal by the plaintiffs from an order sustaining a demurrer to the complaint. The facts set forth in the complaint may be briefly stated to be as follows: In 1877 the plaintiffs, who are husband and wife, owned the land which is the subject of this action, consisting of 160 acres, it being their farm. In that year they entered into an agreement with their son, the defendant Frederick Peters, Jr., for the sale and transfer to him of the farm and certain valuable personal property, in consideration of a written agreement on his part, which is fully set forth in the complaint. The general nature of this agreement of the son was in part for the support of the plaintiffs during their lives, the specific agreement being that he should pay to them yearly a stated sum of money; provide them with stated quantities of farm produce, the use of a cow, and of two sheep, as long as sheep should be kept on the farm; one fourth of all the eggs produced on the farm; to provide a room for their occupancy; and to make certain provision for and payments to other persons named, in certain specified contingencies. In consideration of this agreement, the plaintiffs conveyed the land to their son by warranty deed, expressing the consideration of fifteen hundred dollars. The written agreement of the grantee, although contemporaneous with the deed, was not referred to therein. In 1879 the said grantee, Frederick, Jr., with the consent of the plaintiffs, and for their benefit, conveyed the farm to the defendant Reiners, the consideration being an agreement by Reiners to assume and perform the said obligations of Frederick, Jr., to the plaintiffs. In 1881, Reiners, with the consent of the plaintiffs, sold and conveyed the farm to the defendant Tunell, the consideration being an agreement by the latter to assume and perform the same obligations; and he received the said personal property, and went into possession of the farm. In 1883, Tunell, without the knowledge or consent of the plaintiffs, and with intent to defraud them, sold and conveyed eighty acres of the land to the defendant August Hintz, forty acres to the defendant Henry Peters, and the remaining forty acres to the defendant George Steep. The title thus conveyed still remains in the three grantees last named. The plaintiffs were compelled to leave

the farm in 1882, because they were not provided with the means of maintenance. The defendants Frederick Peters, Jr., Reiners, and Tunell have failed to perform the obligations assumed by them, successively, one thousand dollars of the money agreed to be paid being now unpaid, and they are now insolvent. All of the successive grantees of the land had knowledge of the terms and conditions of these agreements made for the support of the plaintiffs.

The plaintiffs seek such relief as might be had upon a vendor's lien. It is, indeed, apparent that they have no remedy, as respects the land, unless it is to be considered that they enjoyed the equitable right of a vendor's lien to secure the performance of the agreement made for their support. The conveyance by deed from the plaintiffs having been absolute, without condition, and without fraud, the subsequent breach of the personal obligation of the grantee, which was the consideration for the conveyance, did not affect the title which had been thus effectually transferred. As to the validity and legal effect of the deed to the plaintiffs' son, no question can arise. It is not alleged to have been procured by any solicitation or undue influence, or that the transaction was affected by fraud, or that the grantors suffered under any mental infirmity. It appears from the complaint that the agreement for the plaintiffs' support in the manner set forth was made in consideration of the sale and transfer both of the land and of "certain valuable personal property," and, so far as appears, without any price or consideration being fixed upon the two classes of property separately, the sale and transfer of the whole property being the entire and unapportioned consideration for the agreement for support. But as a vendor's lien does not arise, according to the common law, from a sale and delivery of personal property, but is confined to sales of real estate, it follows that the plaintiffs did not acquire a lien to secure the performance of this contract, which, according to the complaint, was the consideration or price for the sale of both the personal property and the land, without distinction: *Stringfellow v. Irie*, 73 Ala. 209; *Wilkinson v. Parmer*, 82 Ala. 367; *McCandlish v. Keen*, 13 Gratt. 615; 2 Jones on Liens, sec. 1072.

But upon broader grounds we arrive at the same conclusion. It is in accordance with what is deemed to be the greater weight of authority that a vendor of real property is not entitled to an implied equitable lien to secure the performance

of the consideration when that is of such a nature, as is that in this case, that the court cannot accurately ascertain and define the amount of the charge to be imposed upon the land and enforced out of it: *Arlin v. Brown*, 44 N. H. 102; *Brawley v. Catron*, 8 Leigh, 522; *Hiscock v. Norton*, 42 Mich. 320; *Clarke v. Royle*, 3 Sim. 499; 1 Perry on Trusts, 4th ed., sec. 235; 2 Jones on Liens, sec. 1071. In *Hammond v. Peyton*, 34 Minn. 529, it was shown that the tendency both of adjudication and of legislation was opposed to an extension of the doctrine of vendor's lien beyond what might be regarded as the established rules of equity upon the subject; and reasons were there suggested why this policy of restriction, rather than of extension, should be pursued. Those reasons, and the principle of that decision, are applicable to affect the decision of this case. While there are some decisions which support the right of lien in similar cases, it is considered that the stronger current of authority is the other way, that the stronger reasons are opposed to it, and that to allow the implication of a reserved lien in this case would be extending the doctrine beyond its hitherto established limits. Indeed, the practical difficulty of enforcing such a lien, in a case like this, is in itself a reason against the existence of the lien. The contract was not to be performed by a single act, and once for all; but performance was to extend indefinitely over a period, it might be, of many years, and was to consist of various acts besides the payment of money. What was required to be done was contingent and uncertain, depending upon future events impossible to be calculated or ascertained, and this uncertainty as to what was to be done would continue indefinitely. There was no lien, unless it existed from the beginning, at the time of the conveyance, and before any obligation had become defined, certain, and ascertainable. It certainly has not been generally supposed that the doctrine of vendor's lien extended to contracts of such a nature.

Order affirmed.

VENDOR'S LIEN — SALE OF PERSONALTY. — The vendor has no lien after the delivery of personalty to the purchaser: *Lepin v. Marie*, 6 Wend. 77; 21 Am. Dec. 256, and note; *Miller v. Marston*, 35 Me. 153; 56 Am. Dec. 694, and note.

GUIRNEY v. ST. PAUL, MINNEAPOLIS, AND MANITOBA RAILWAY COMPANY.

[43 MINNESOTA, 436.]

LIABILITY OF MASTER TO INDEMNIFY SERVANT FOR DAMAGES RESULTING FROM LATTER'S VIOLATING INJUNCTION BY FORMER'S ORDER. — Where a servant of a corporation upon which an injunction has been served, restraining it from doing certain acts, does these acts by order of the corporation, which imparts to him no notice of the injunction, but conceals its existence from him, the corporation is bound to indemnify him for the damages sustained by him as the natural result of his obedience to its orders; nor does its liability depend upon the ultimate determination of the question as to which of the contending parties is legally right in respect to the title of disputed property, or the legality or propriety of the injunction order, or the sufficiency of the service thereof. A master may not expose his servant to danger of loss or injury in the execution of orders, the risk of which is known to him, but of which he wrongfully withholds notice from the servant.

ACTION to recover damages. The opinion states the case.

John W. Willis, for the appellant.

Flandrau, Squires, and Cutcheon, for the respondent.

VANDEBURGH, J. The controversy in this case grows out of an attempt by the Fargo Southern Railroad Company to make a crossing over the track and road-bed of the defendant at Wahpeton, Dakota. The plaintiff was foreman of railway repairs and construction for the defendant, and was directed by it to repair its track, which had already been cut and injured at the place in question, and to prevent the Fargo company from interfering with the track of his company, and to protect the same from further injury or molestation. These instructions were obeyed by the plaintiff, and while he was so engaged he was arrested upon a warrant issued out of the district court of Dakota Territory for contempt in violating an injunction order previously issued by that court in a suit of the Fargo company against this defendant. This order commanded the defendant company, its agents, attorneys, and assistants, and each of them, to desist and refrain from doing or causing to be done any act or thing which would in any manner interfere with or prevent the Fargo company from building its road over the land in dispute upon which the proposed crossing had been attempted. The order was duly served upon the defendant, but plaintiff alleges that he had no notice of it, and was not informed of its existence by the defendant, but that the defendant concealed from plain-

tiff the fact of the issuance of the order, and in defiance thereof issued further orders to the plaintiff to repair and preserve intact the defendant's track, and directed him to oppose, and if possible prevent, the crossing thereof by the Fargo company, the plaintiff in the injunction suit, which acts were in fact, as he alleges, in violation of the injunction order; and while the plaintiff was proceeding to execute his orders, but in ignorance of the injunction, he was arrested, as before stated. This action is brought for the damages suffered by the plaintiff on account of his arrest and detention under the warrant, and is based upon the alleged wrongful acts and misconduct of the defendant in exposing him as its servant to the danger of an arrest for the violation of the injunction, which danger was known to the defendant, but concealed from the plaintiff. It is also alleged in the complaint that the defendant knew that the commission by him, under its direction, of any act prohibited by the injunction, would subject the plaintiff to great danger of arrest and imprisonment. The defendant, among other things, alleges in its answer that the plaintiff appeared before the court which issued the injunction order to answer the charge of contempt, and that after investigation and inquiry an order was duly made and entered by the court in such proceeding, adjudging the plaintiff to be innocent of any violation of such injunction order, and discharging him from arrest, and that the order was vacated and discharged as against the defendant also. The reply denies that there was any investigation or inquiry by the court into the alleged contempt, and avers that the action of the court in the premises was in pursuance of a stipulation between the counsel of the respective parties, and not upon inquiry.

It is proper to say that the defendant's answer takes issue upon many of the allegations of the complaint upon which the plaintiff relies to support the liability of the defendant. But at the trial the defendant moved for judgment on the pleadings, and the motion was granted; and this appeal brings up for consideration here the propriety of that decision. For the purposes of the motion, the truth of the allegations in the complaint was necessarily assumed, while the averments in the answer not admitted by the reply were to be taken as untrue or not established. Upon that motion, however, the orders dismissing the injunction proceedings against the defendant and its agents, including this plaintiff, together with the stipulations of the attorneys of the respective parties con-

senting to such dismissal, were by consent received and considered by the court. The question then recurs whether, upon the record thus presented, the motion for judgment in this action was warranted. It is true that if the plaintiff had in fact no notice of the injunction, and in ignorance of it was in good faith executing the orders of the defendant, he did not render himself legally liable to be punished for contempt; but the circumstances of the case must be carefully considered in determining in respect to the dangers to which plaintiff was exposed. There was an attempt on defendant's part to resist, by physical force and strong hand, an attempt by the Fargo company to construct the railway crossing. If the complaint is true, the defendant's directions, and plaintiff's acts in pursuance thereof, were in violation of the injunction, and were unlawful, as long as the injunction was pending; and whatever may have been the grounds upon which the court dismissed the proceedings, it does not follow that there was not a *prima facie* case made upon which the order against the plaintiff was issued.

The complaint alleges that the defendant exposed the plaintiff, in the manner recited, to the danger of an arrest for a contempt, without notice to him, and that it knew that the plaintiff would be liable to be subjected to such danger. We may infer, from the conceded facts and the peculiar circumstances, that some proceedings would be likely to be taken to prevent or punish a violation of the injunction by defendant's servants. And so, if the defendant had, as is alleged, reason to expect such results to its servants while in good faith engaged in its service, without notice of the injunction, it would seem right and just that they should be indemnified for the injuries suffered by them as the result of their obedience to defendant's orders. And the defendant's liability does not depend upon the ultimate determination of the question as to which of the contending parties is legally right in respect to the title of disputed property, or the legality or propriety of the injunction order, or the sufficiency of the service thereof. The master may not expose his servant to danger from a wrong-doer or trespasser without proper warning: *Moore v. Appleton*, 26 Ala. 633; *Baxter v. Roberts*, 44 Cal. 187; 13 Am. Rep. 160. The proposition upon which plaintiff relies to sustain his cause of action is, in brief, that the defendant was bound to indemnify him against loss and damage suffered in the course of his employment, the risk of which the defendant understood, but

wrongfully withheld from him such notice as was necessary for his protection. We think there is sufficient in the complaint to support this contention, and that the case should have proceeded to trial on the merits.

Order reversed.

MASTER AND SERVANT. — The master must provide for the safety of his servant to the best of his skill and judgment: *Richmond etc. R'y Co. v. Norment*, 84 Va. 167; 10 Am. St. Rep. 827. A servant ordered into a situation of danger is not negligent in obeying; for a servant is not bound to set up his judgment against his master's in reference to obeying orders, and the master is responsible in damages for ordering his servant to do extra-hazardous work: *Stephens v. Hannibal etc. R. R. Co.*, 96 Mo. 207; 9 Am. St. Rep. 336. But see *Jordan v. Hovey*, 72 Mo. 574, 37 Am. Rep. 447, in which it was decided that a master was not liable in damages to his female servant whom he induced to have sexual intercourse with his minor son, to whom she was affianced. To show such relation of master and servant existing as will render the master liable to indemnify the servant, it must appear that the servant is acting at the time for the master, representing his master's will, and not his own, and that the business being done is his master's, and not his own: *Corbis v. American Mills*, 27 Conn. 274; 71 Am. Dec. 63.

WILCOX v. LEOMINSTER NATIONAL BANK.

[43 MINNESOTA, 541.]

PRIORITY OF DOCKETED JUDGMENT OVER EQUITY TO HAVE DEED REFORMED.

— A docketed judgment has precedence not only over an unrecorded deed of which the judgment creditor has no other notice, but also over a mere equity on the part of a grantee, of which the judgment creditor has no notice, to have a deed reformed so as to make it include the real estate in question.

MERE POSSESSION OF TENANT IN COMMON IS NOTICE OF HIS OWN TITLE

ONLY, but is not notice of change of title on the part of his co-tenant. He is presumed to be in of his own right, by virtue of his own title, and not under his co-tenant's title.

ACTION to determine adverse claims to real estate. The opinion states the case.

S. H. Hudson and J. C. Haynes, for the appellant.

Edward E. Webster and Marshall A. Spooner, for the respondent.

GILFILLAN, C. J. The action is under the statute to determine adverse claims to real estate. On and prior to February 23, 1886, A. G. and W. F. Wilcox each owned an undivided half of a tract of land of 640 acres, constituting

one farm, including the land in controversy; and on that day said A. G. and this plaintiff, his wife, executed a deed which was intended to convey the entire farm to one Thornburgh, and he executed a deed of conveyance to plaintiff, the purpose of the two deeds being to vest in her title to the undivided half theretofore owned by A. G. By mistake of the scrivener who drew the deeds, the description of the land in controversy was omitted. The deeds were recorded February 26, 1886. On discovering the mistake, on December 31, 1887, A. G. and the plaintiff executed a conveyance to Thornburgh, and he executed one to plaintiff, both correctly describing the 640-acre tract. These deeds were recorded February 28, 1888. But meantime, and just prior to recording them, a judgment in favor of this defendant against A. G. Wilcox was docketed in the county. Neither plaintiff nor A. G. Wilcox was ever in personal possession of the land. Up to the execution of the first deed, W. F. Wilcox was in possession, raising and breeding stock for himself and A. G. At the execution of said deed, A. G. transferred his interest in the stock and business to plaintiff, and W. F. continued the business and management of the farm, and to reside upon it as formerly, till the trial. The defendant had no notice of the transactions, unless it might be charged with it from the possession of W. F. The facts with reference to the business were not known to it till after the docketing of its judgment.

The statute giving effect to registration of deeds (Gen. Stats. 1878, c. 40, sec. 21) places a docketed judgment upon the same footing as a recorded conveyance, and gives to it precedence over an unrecorded deed, unless the judgment creditor have other notice of the unrecorded conveyance: *Lamberton v. Merchants' Nat. Bank*, 24 Minn. 281; *Dutton v. McReynolds*, 31 Minn. 66. In the absence of notice to the defendant, this would dispose of the case, unless, as plaintiff seems to claim, her mere equity to have the deed reformed makes her position superior to what it would be with a perfect but unrecorded deed. This cannot be. The purpose of the statute is to protect purchasers, and attachment and judgment creditors, against claims to the real estate of which they have no notice by the record or otherwise. This would be as effectually defeated by allowing a mere equity, of which the judgment creditor has no notice, to displace the lien of his judgment, as by allowing a legal unrecorded title to have that effect. The record, as it stood when the judgment was docketed, contained

no notice of any right in plaintiff, legal or equitable, except to the land described in her deed.

W. F. Wilcox was a tenant in common of the land. As such, he had a right to the exclusive possession as against all the world but his co-tenant. His possession was notice of his own title, but it could not be notice of change of title on the part of his co-tenant. He would be presumed to be in of his own right, by virtue of his own title, and not under his co-tenant's title. Notice that he was also holding under his co-tenant would undoubtedly be notice also of his co-tenant's title. But his mere possession would not be notice that he was in under any one but himself. So that his possession alone was not notice of any equity that had arisen between his original co-tenant and the plaintiff.

Judgment affirmed.

JUDGMENT LIEN — UNRECORDED DEED. — The lien of a judgment is preferred to a prior unrecorded deed: *Reed v. Austin*, 9 Mo. 722; 45 Am. Dec. 336, and note; provided the judgment creditor did not have actual notice of such deed: *Doyle v. Wade*, 23 Fla. 90; 11 Am. St. Rep. 334.

CO-TENANCY — POSSESSION AS NOTICE. — Possession by a tenant with an unrecorded deed from his co-tenant, when does not charge notice to a purchaser of the co-tenant's interest under execution: *May v. Sturdivant*, 75 Iowa, 116; 9 Am. St. Rep. 463.

CASES
IN THE
SUPREME COURT
OF
MISSISSIPPI.

**MOBILE AND OHIO RAILROAD COMPANY v. TUPELO
FURNITURE MANUFACTURING COMPANY.**

[67 MISSISSIPPI, 35.]

CARRIERS—BURDEN OF PROOF.—IF A CARRIER DELIVERS GOODS IN A DAMAGED CONDITION which started on their journey over connecting lines in good condition, it must exculpate itself from liability by showing that the injury done occurred without its fault.

ACTION to recover damages for machinery delivered in an injured condition. This machinery was given to the Chicago and Western Michigan Railway Company, at Grand Rapids, Michigan, to be shipped to Tupelo, Mississippi, and was then in good condition. It was carried over various lines of railway until it reached that of the Mobile and Ohio railroad at St. Louis, and was transported by the latter railway to its place of destination, and there delivered to the consignee in a damaged and broken condition. There was no evidence to show at what place or upon what line of railway the injuries occurred. Judgment for plaintiff; defendant appealed.

John A. Blair and E. L. Russell, for the appellant.

Allen, Robins, and Stribling, for the appellee.

CAMPBELL, J. The first and second instructions given for the plaintiff are objectionable, but immaterial because not influential in determining the case, which is properly resolvable, in view of the facts, by a resolution of the question whether it devolved on the plaintiff to show that the damage to the property was done on the road of the defendant, or on

the defendant to show that it occurred before it received the goods for transportation. That is the only material question in the case.

We think the better reason and policy, and the greater number of cases adjudged, favor the rule to require the carrier which delivers goods damaged, and which are shown to have started on their journey over connecting lines of transportation in good condition, to exculpate itself from liability by showing that the injury did not occur by its default.

Affirmed.

CARRIERS — DAMAGED FREIGHT — BURDEN OF PROOF. — The presumption arises that perishable goods shipped in good order continue in that condition when in the hands of a connecting carrier, and the burden of proof is on him to show that they were not in good condition when received by him: *Beard v. Illinois C. R'y Co.*, 79 Iowa, 518; *Shriver v. Sioux City etc. R. R. Co.*, 24 Minn. 506; 31 Am. Rep. 353. *Prima facie*, the carrier is liable for goods upon proof of acceptance thereof for carriage, and of loss or damage thereto while in transportation: *Hull v. Chicago etc. R'y Co.*, 41 Minn. 510; 16 Am. St. Rep. 722. And the burden of proof rests upon the carrier to show the absence of negligence upon its part: *Lindsley v. Chicago etc. R'y Co.*, 36 Minn. 530; 1 Am. St. Rep. 692, and note.

TYLER v. HERRING.

[67 MISSISSIPPI, 169.]

TRUSTEE'S SALE CONDUCTED BY HIS AGENT — FAILURE OF TRUSTEE TO TAKE POSSESSION. — TRUSTEE'S SALE IS NOT RENDERED INVALID by the fact that the sale was cried by a person selected by the trustee, whose act the trustee afterwards confirmed, nor by the latter's failure to take possession of the land before the sale, though the trust deed declared that upon default the trustee should immediately take possession, and after giving notice, sell the land therein described.

TRUSTEE'S SALE. — THE PERFORMANCE OF THE MERE MINISTERIAL ACTS OF posting the notice and making sale by agents selected by the trustee does not affect the validity of the sale.

TRUSTEE'S SALE, PRESUMPTION IN SUPPORT OF. — The presumption is to be indulged that a trustee did those acts *in pais* which were conditions precedent to the valid execution of the power of sale. The force of this presumption may be overcome by any competent evidence sufficient to produce an equilibrium, or to leave the preponderance so lightly in favor of the presumption as that the jury do not believe some act to have been done which was essential to the validity of the sale.

EVIDENCE. — TRUSTEE'S DEED WHICH RECITES that the sale had been made after giving notice as required by the deed of trust establishes *prima facie* that proper notice has been given; but the effect of the deed in this respect may be overcome by any competent evidence which, notwithstanding the deed and its recitals, leaves the jury unable to say that the notices were given.

ACTION of ejectment. The plaintiff's title was dependent upon a sale made by a trustee acting under a deed of trust given to secure a debt due the plaintiff. The trustee was, on account of his illness, unable to attend the sale, and conduct it in person, and therefore directed his brother to make it as his agent. All the acts which the brother did were ratified by the trustee. The trust deed provided that upon default in payment of the debt the trustee should immediately take possession, and after giving notice of sale, sell the land described in the deed. After the default in the payment of the debt, the trustee demanded possession of the land, but being refused, proceeded to sell without first obtaining such possession. Judgment in favor of the plaintiff. Defendant appealed.

Haden and Dodd, for the appellants.

Monroe McClurg, and Brame and Alexander, for the appellee.

COOPER, J. The sale under the deed of trust was not invalid either because the trustee did not take possession of the land before the sale, or for the reason that, the trustee being sick, the land was cried off by a person selected by him, whose act he afterwards ratified and approved.

The provision of the deed of trust, that "upon default of payment of the debt secured the trustee shall immediately take possession, and having given notice, sell the land conveyed," etc., was intended to confer upon the trustee the right of possession, but did not make such taking possession a condition precedent to the power of sale: *Vaughn v. Powell*, 85 Miss. 402.

The performance of the mere ministerial acts of posting the notices and making the sale by agents selected by the trustee does not affect the validity of the sale: *Jones v. Sergeant*, 45 Miss. 332.

The deed from the trustee to the purchaser, Herring (who was beneficiary in the deed of trust), recites that the sale was made after notice had been given in the manner prescribed by the deed. This was by posting notices in three public places in the county for the period of ten days preceding the day of sale.

The trustee was introduced as a witness on behalf of plaintiffs, and on cross-examination stated that he did not personally post any one of the notices, and only knows they were posted by what he has been told. Other evidence introduced by plaintiff showed that one of the notices had been posted

for the required time; as to the other two, it appears that the trustee gave them to an agent, and directed him to post one at Briscoe's mill and the other at Rickett's mill, these being public places within the county. It was then proved by a certain witness that some time before the sale of the property he saw the two notices at the above-named places; but this witness could not remember whether this was ten days before the day of sale.

In this condition of the evidence, the court, at the instance of the plaintiff, charged the jury as follows: "The law presumes that the notices were posted as stated in the trustee's deed, and if the defendants deny that they were, they must show to the satisfaction of the jury, by the evidence, that they were not so posted."

The first instruction for the defendants, which was refused by the court, was this: "The burden of proof is upon the plaintiff to satisfy the minds of the jury by a preponderance of the evidence before them that Monroe McClurg, trustee, posted or had notices posted in three public places in Attala County of the sale of the lands in controversy, and if the jury are not so satisfied, they must find for the defendants."

If by the instruction given for the plaintiff it was intended to state that the recitals in the deed of the trustee that the notices had been posted should control until it was shown by positive and direct testimony that they were not so posted, then the instruction was too rigid against the defendants. The presumption is to be indulged that the trustee did those acts *in pais*, which were conditions precedent to a valid exercise of the power of sale, as held in *Graham v. Fitts*, 53 Miss. 307, and in the absence of any evidence to the contrary, such presumption must prevail. But it is not required of the defendant to rebut such presumption by introducing evidence sufficient to show that the notices were not in fact posted. The presumption is not a conclusive one; its force and effect may be impaired by any competent evidence, and when opposing evidence is introduced sufficient to produce an equilibrium, or to leave the preponderance so slightly in favor of the presumption arising from the deed as that the jury do not believe the act to have been done, then the defendants are entitled to their verdict.

The court, by refusing the instruction asked by the defendants, that the burden of proof was upon the plaintiff to establish the fact of posting the notices, imposed upon them,

not the burden of meeting a *prima facie* case made by the plaintiff's evidence, but the burden of producing a clear and sufficient preponderance of evidence on the whole case. The true view is, that the plaintiff begins and ends with the burden of proof. Introducing the trustee's deed, he makes a *prima facie* case; it then devolves upon the defendant to meet the case thus made, failing in which the plaintiff is entitled to recover. But the defendant meets the case made by the plaintiff when his evidence equals in value and weight that of the plaintiff, or so nearly does so as to leave the plaintiff's evidence insufficient to establish the fact it was introduced to prove.

In the case before us, if the jury, on the whole evidence, believed the notices to have been given as required by the deed of trust, the plaintiff was entitled to a verdict; if, on the other hand, on the whole evidence, they were unable to say that the notices were so posted, then the plaintiff failed to make out his case, and the verdict should have been for the defendant.

The judgment is reversed and cause remanded.

SALES AND CONVEYANCES BY TRUSTEES. — We propose in this note to treat of sales and conveyances by trustees, and the circumstances under which such sales and conveyances will be adjudged either void or voidable.

In some instances, property, whether real or personal, is held in trust without the instrument vesting title in the trustee, indicating that it is so held. When such is the case, the trustee, while dealing with persons who have no notice of the trust, has the same power as if he were the holder of the equitable as well as of the legal title. In other words, a purchaser from him in good faith and without notice of the trust obtains the title of the trustee, and holds it discharged of the trust, and free from all obligation to account to the beneficiary: *Orocker v. Orocker*, 31 N. Y. 507; 88 Am. Dec. 291; *Wyes v. Dandridge*, 35 Miss. 672; 72 Am. Dec. 149; *Prevo v. Walters*, 5 Ill. 35; *Christmas v. Mitchell*, 3 Ired. Eq. 535; *Thompson v. Gilliland*, Addis. 296; *Bracken v. Miller*, 4 Watts & S. 102; *Hudnal v. Wilder*, 4 McCord, 294; 17 Am. Dec. 744; *Henderson v. Dodd*, 1 Bail. Eq. 138; *Ex parte Williams*, 18 S. C. 209; *Perry on Trusts*, sec. 218.

To entitle a purchaser from a trustee to hold the property discharged from the trust, it is, of course, necessary that he be an innocent purchaser in good faith. We shall not stop to consider at length who is such a purchaser. It suffices our present purpose to state that he must be a purchaser for a valuable consideration, and such consideration must have been paid and a conveyance of the legal title taken before receiving notice of the trust: *Paul v. Fulton*, 25 Mo. 156; *Freeman on Executions*, sec. 141; *Perry on Trusts*, sec. 221. Notice of a trust will be imputed to a purchaser when there is any declaration or recital in the deeds through which he must deraign title, either asserting the existence of the trust, or sufficient to incite inquiry in a man of common prudence, where such inquiry, if pursued, would have re-

vealed the existence of the trust: *Brannon v. May*, 42 Ind. 92; *Howard Ins. Co. v. Halsey*, 8 N. Y. 271; 59 Am. Dec. 478; *Perry on Trusts*, secs. 222-224; *Wilson v. McCullough*, 23 Pa. St. 440; 62 Am. Dec. 347; note to *Gale v. Mensing*, 64 Am. Dec. 201. Notice of a trust is not, however, confined to the recitals in the deeds through which the trustee acquires title. It may be acquired in any of the various modes by which notice may be given in other cases, and if a beneficiary under the trust, or his agents or lessees, are in possession, that fact is sufficient to put an intending purchaser on inquiry, and to charge him with notice of the trust, if no inquiry is made: *Pritchard v. Brown*, 4 N. H. 397; 17 Am. Dec. 434; *Pell v. McElroy*, 36 Cal. 263; *Perry on Trusts*, sec. 223. *Contra*, *Scott v. Gallagher*, 14 Serg. & R. 333; 16 Am. Dec. 506.

If the grantee of a trustee is not a purchaser for a valuable consideration, or if, being a purchaser for a valuable consideration, he purchased with notice of the trust, actual or implied, unless the sale or transfer to him was authorized, he, if he acquires any title whatever, merely takes the place of his grantor, and becomes chargeable with the execution of the trust to the same extent that such grantor was chargeable before such transfer: *Ryan v. Doyle*, 21 Iowa, 53; *Stewart v. Chadwick*, 8 Iowa, 463; *Jones v. Shaddock*, 41 Ala. 262; *Webster v. French*, 11 Ill. 254; *Hagikorp v. Hook*, 1 Gill & J. 270; *Murray v. Balku*, 1 Johns. Ch. 566; *Shepherd v. McEvers*, 4 Johns. Ch. 136; *Pinson v. Ivey*, 1 Yerg. 296; *Heth v. Richmond etc. R. R. Co.*, 4 Gratt. 482; 50 Am. Dec. 88; *Lincoln v. Purcell*, 2 Head, 143; 73 Am. Dec. 196; *Tobin v. Helm*, 4 J. J. Marsh. 288; and he may also be held jointly liable with the original trustee for the breach of the trust: *Barkedale v. Finney*, 14 Gratt. 338.

Where the rules of a law upon the subject have not been modified by statute, all conveyances by a trustee, whether to an innocent purchaser or not, and whether in contravention of the trust or not, operate upon the legal title and vest it in the grantee. This conclusion necessarily followed from the refusal of the common law to recognize trusts or equitable titles, for unless such trusts or titles were to be considered, there was no reason why the trustee should not convey to whomsoever he pleased. His conveyance was therefore valid at law, and the rights of the beneficiary could be protected only by his seeking redress in equity and compelling the grantee to respect and to execute the trust, as the original trustee should have done: *Gale v. Mensing*, 20 Mo. 461; 64 Am. Dec. 197, and note; *Taylor v. King*, 6 Munf. 368; 8 Am. Dec. 746; *Koester v. Burke*, 81 Ill. 436; *Wilson v. South Park Commissioners*, 70 Ill. 46; *Walton v. Follansbee*, 131 Ill. 147; *Bank of U. S. v. Benning*, 4 Oranch C. C. 81; *D'Oyley v. Loveland*, 1 Strob. 45; *Rees v. Allen*, 5 Gilman. 236; 48 Am. Dec. 236; *Rees v. Beckett*, 30 Ind. 154. An exception to this rule exists in Pennsylvania, probably having its origin in the blending, in that state, of the systems of law and equity. It is, in the opinion of the courts of that state, the duty of the grantee of property which is subject to a trust to reconvey to the original trustee; and they will presume that he has performed this duty, and by this presumption in effect annul the conveyance made to him by the original trustee, if in violation of the trust: *Rife v. Geyer*, 59 Pa. St. 393; 98 Am. Dec. 352. In California, also, it was determined that under a deed to a trustee giving him authority to sell his estate upon the approval of the grantor that it was incumbent upon one claiming under a conveyance from the trustee to show that such conveyance was made with the assent of the trustor, and that in the absence of such assent the conveyance must be treated as inoperative: *Sprague v. Edwards*, 48 Cal. 239. The disposition of the case before the court was doubtless correct, owing to the provision of the

statute of that state to be mentioned in a subsequent paragraph; but the action of the court was taken in apparent obliviousness of the statute, and was professedly based upon authorities whose pertinency to the subject under consideration we are unable to perceive.

A trust estate may be vested in two or more trustees, and a conveyance may be made by one or by some number less than the whole of the trustees. In England the opinion seems to be entertained that, though the conveyance is in contravention of the trust, and the signatures of the co-trustees and of the *cestui que trust*, whose assent is requisite to a sale, are all forged, still that such conveyance transfers the legal estate of the trustee who executed it: *Boursot v. Savage*, L. R. 2 Eq. 134. The decisions in the United States proceed upon the theory that the estate of trustees, being given to them to accomplish the purposes of a trust, must be regarded as an inseparable unit, and a conveyance by either trustee without the concurrence of the others as absolutely void: *Sinclair v. Jackson*, 8 Cow. 553-583; *Learned v. Welton*, 40 Cal. 349; *Ridgeley v. Johnson*, 11 Barb. 527; *Wilbur v. Almy*, 12 How. 180.

The statutes of New York, Michigan, Wisconsin, Minnesota, Kansas, California, and Dakota declare that when a trust in relation to real property is expressed in the instrument creating the estate, every transfer or other act of the trustees, in contravention of the trust, is absolutely void: Cal. Civ. Code, sec. 870; Stimson's American Statute Law, sec. 1725. It is somewhat singular that these statutes have escaped judicial interpretation except in the first-named state, while in that state they have been quite frequently considered by its courts. The doubts most likely to arise concerning the signification of these statutes are, first, do they mean that inhibited conveyances shall be deemed void in law as well as in equity? and second, if void both at law and in equity, are they also void when, upon their face, they appear to be made pursuant to the authority conferred on the trustee? And the fact of their being in contravention of the trust must be established by extrinsic evidence; and knowledge of this fact cannot be brought home to the grantee or his successors in interest. With respect to the first question, there appears to be no doubt that an inhibited conveyance is void at law; that the legal as well as the equitable title remains in the trustee; and he may maintain an action to recover the property, or may exercise any other power, or perform any other duty, as if such conveyance had not been executed: *Zimmerman v. Kiukle*, 108 N. Y. 282; *Russell v. Russell*, 36 N. Y. 581; *Fitzgerald v. Topping*, 48 N. Y. 438; *Wetmore v. Porter*, 92 N. Y. 76. By these statutes the trust estate is made inalienable and indestructible, except by transfers not in contravention of the trust, and the courts have no power to authorize an inhibited conveyance to be made: *Douglas v. Cruger*, 80 N. Y. 15; *Cruger v. Jones*, 18 Barb. 467. Nor can validity be imparted to a conveyance in contravention of a trust by the fact that it appears on its face to be made pursuant to the trust, and the persons claiming under it have no notice that the facts asserted in it did not exist. The presence of the facts authorizing a conveyance are regarded as conditions precedent to the exercise of the power to convey; and in their absence the power does not exist, and the conveyance is as if a stranger to the title had made it: *Griswold v. Perry*, 7 Lana. 105; *Swarthout v. Curtis*, 5 N. Y. 301; 55 Am. Dec. 345. The leading case upon this topic is that of *Briggs v. Davis*, 20 N. Y. 15, 75 Am. Dec. 363, the facts of which were as follows: One Masten, being the owner of property, executed a conveyance thereof to three persons, in trust to sell the same for the benefit of his creditors. The trustees subsequently executed a reconveyance to the

grantor, of property which had not been disposed of by them, and in their reconveyance recited that the object of the trust had been accomplished. Masten, to whom this reconveyance was made, thereafter executed a mortgage to one who had no notice that the trust had not been fully executed, as recited in the reconveyance. An action was afterwards brought in the interest of creditors of Masten, who claimed that the debts due to them from him had not been paid at the time of the reconveyance; that such reconveyance was in contravention of the trust; and they therefore asked that the mortgage made by Masten be set aside and canceled. In affirming a judgment granting the relief prayed for, canceling the mortgage and enjoining its foreclosure, the court of appeals said: "A party about to take a title under such a reconveyance, with a knowledge of the terms of the trust, would know that it was an essential prerequisite to the validity of the deed that the trusts should have been actually performed. There is no principle which substitutes the declaration of the trustees, however solemnly made, in place of the fact which could alone authorize them to reconvey. The purchaser, if he would be safe, must not content himself with the recital that the trusts have ceased, but must ascertain, at his peril, whether such is the case. The statute avoids all deeds which are, in truth, in contravention of the trust, and there is no exception in favor of such as are fraudulently made to appear in consonance with it by means of untrue statements inserted in them. We have been referred to the statutory provision declaring that the title taken under a trustee authorized to sell is not to be impeached on account of the misapplication of the money paid for such title by the trustees. The conveyances here upheld are such as are made in fact and in form in pursuance of the trust, and where the only fault is the subsequent misconduct of the trustees in embezzling or misapplying the money; and I conceive that the enactment has no application to a case like the present." After mentioning authorities which in England maintain that a *bona fide* purchaser for a valuable consideration, who acquires the legal title, shall be protected against a prior equity, of which he had no notice, the court held that these authorities could have no application because the statute under consideration precludes a grantee of a conveyance made in contravention of a trust from obtaining the legal title, and said that the title did not pass, because the trustees "could not legally make an operative conveyance, except in the execution of the trust, and the deed to Masten was not in the execution of the trust, but in disaffirmance of it. It was in hostility to it, and if operative, it subverted and put an end to it, though its objects were not accomplished. It was precisely such a conveyance as the statute referred to by the terms 'conveyances in contravention of the trust.' The mandate of the statute that such conveyances shall be absolutely void forbids us to hold that they shall pass the legal estate which was vested in the trustees, for the purpose of tacking equitable interests to it, or for any other purpose. I repeat, therefore, that this reconveyance, upon the facts which were established on the trial, was inoperative as against the creditors of Masten, and that they were, notwithstanding, entitled to have the land embraced in it subjected to sale for the payment of their debts."

One contemplating a purchase from a trustee must, as in other cases, remember that no grantor can transfer an estate of which he has never been seized: *Wallon v. Pollansbee*, 131 Ill. 147. In determining whether a trustee has an estate, and if so, what is its extent, the same investigation needs to be made and the same rules to be observed as in other cases, except that the estate vested in him may be determined from the general purposes of the trust, though not otherwise specially described or limited in the deed by

which the trust was created. In the absence of any statutory modification of the common law, a conveyance does not vest an estate of inheritance in the grantee, without the use of the word "heirs"; but this rule is not always applicable to conveyances of trustees. If the purposes of the trust are disclosed by the conveyance, and are such as cannot be accomplished unless the trustee acquires a fee, then an estate in fee vests in him, though the word "heirs" does not appear in the deed: *Melick v. Pidcock*, 44 N. J. Eq. 525; 6 Am. St. Rep. 901; *Cleveland v. Hallett*, 6 Cush. 407; *Newhall v. Wheeler*, 7 Mass. 189; *Brooks v. Jones*, 11 Met. 191; *Gould v. Lamb*, 11 Met. 84; 45 Am. Dec. 187; *Sears v. Russell*, 8 Gray, 86; *Fisher v. Fields*, 10 Johns. 505; *Chamberlain v. Thompson*, 10 Conn. 243; 26 Am. Dec. 390; *Villiers v. Villiers*, 2 Atk. 72; *Morton v. Barrett*, 22 Me. 257; 39 Am. Dec. 575. "The extent or quantity of the estate taken by the trustee is determined, not by the circumstance that words of inheritance in the trustee are or are not used in the deed or will, but by the intent of the parties. And the intent of the parties is determined by the scope and extent of the trust. Therefore, the extent of the legal interest of a trustee in an estate given to him in trust is measured, not by words of inheritance or otherwise, but by the object and extent of the trust upon which the estate is given. On this principle, two rules of construction have been adopted by courts: first, wherever a trust is created, a legal estate sufficient for the purposes of the trust shall, if possible, be implied in the trustee, whatever may be the limitation in the instrument, whether to him and his heirs or not; and second, although a legal estate may be limited to a trustee to the fullest extent, as to him and his heirs, yet it shall not be carried further than the complete execution of the trust necessarily requires": *Perry on Trusts*, sec. 312; *Ellis v. Fisher*, 3 Sneed, 231; 65 Am. Dec. 52; *Neilson v. Lagow*, 12 How. 98.

Having ascertained that the trustee has such an estate as he is willing to purchase, the next inquiry necessary on the part of an intending purchaser is, whether the trustee has power to sell. This power, we assume, must be found in the instrument vesting the estate in the trustee, or in some other instrument executed or assented to by him and declaring the purposes of the trust. We have been unable to discover any authority determining whether or not a trustee has power to sell when the trust estate is vested in him without any declaration being anywhere made regarding the extent of his powers or the purposes of the trust. In a case in one of the supreme courts of New York, it appeared that a conveyance had been made to one McLean, "as trustee for the association of the Open Board of Stockbrokers of the city of New York"; that the association was not incorporated, and consisted of about four hundred persons; that McLean, on the day of receiving the deed, conveyed the same property to a corporation known as "The Open Board of Stockbrokers' Building Company of the City of New York"; that a receiver was subsequently appointed for both the corporation and the association, and was authorized by the court to sell the same property, and on his making the sale, the title was objected to, on the ground that the trust to McLean was not defined, and therefore that it did not appear that he was authorized to convey as he had done. The court compelled the purchaser to take the title, saying that the trustee, under the statutes of the state, had power to convey, except in contravention of the trust, and that as there was no suggestion that his conveyance was in contravention of the trust, it must be adjudged to vest a perfect title: *People v. Stockbrokers' Building Co.*, 49 Hun, 349. The circumstances of this case were, however, very peculiar. The receiver who had made the sale represented the trustee's *cestui que trust*

as well as his grantee, and it was certain that the purchaser, whether the conveyance by the trustee was authorized or not, would succeed to a complete equity, and that there was no one entitled to assail the conveyance made by the trustee. If it be true when land is vested in one person as the trustee of another, and the purposes of the trust and the powers of the trustees are nowhere stated, that all transfers by the trustee are valid until shown to be in contravention of the trust, then every transfer by him must be held effective, because, as the trust is not disclosed, it is impossible to show affirmatively that anything whatever is in contravention of it. We apprehend, though we can find no authority upon the subject, that when a conveyance is made to one person as trustee of or for the use of another, unless through the operation of the statute of uses the legal as well as the equitable estate is thereby vested in the beneficiary, the law implies that the trustee shall continue to hold the property for the use and benefit of the beneficiary until the latter or his successor in interest demands a conveyance thereof, and that any conveyance by the trustee is in contravention of this implied duty, and will therefore be vacated in equity.

If there are directions in the instrument creating the trust showing that the property is to be retained until a designated time for the purpose of division, or of being turned over to some other person, or for any other purpose, the power of the trustee to sell does not exist, though there are other provisions which, if they stood alone, would confer this power. If land is conveyed in trust, first, to pay the debts of the grantor out of the rents and profits, second, for the support of himself, his wife and children, and third, at his death to be divided among his children, the trustee has no power to sell for the payment of the debts of the grantor, nor for any other purpose, however urgent the necessities for such sale may become: *Mundy v. Vawter*, 3 Gratt. 518. If a testator devises property to trustees, with the direction that they manage the same so as to produce income, which shall remain in their hands or under other control and management until the eldest child of his daughter shall arrive at the age of twenty-one years, or shall marry, and shall then divide the original property among the children of such daughter then living, any power to sell inferable from the direction to manage the property so as to produce an income is annulled by the directions to divide the original property among the children of his daughter after the oldest becomes of age: *Blanton v. Mayes*, 58 Tex. 422. So by expressly giving power to sell a portion of the estate devised to trustees, and testator manifests his intention that the like power shall not be exercised over the balance: *Anderson v. Anderson*, 31 N. J. Eq. 560.

On the other hand, it is quite certain that a power of sale need not be conferred on a trustee in direct or express terms, and may be implied from the purposes of the trust. Whenever a trustee is directed to do something, the doing of which cannot be accomplished otherwise than by a sale, then a power to sell is implied. Note to *Rankin v. Rankin*, 87 Am. Dec. 216; Perry on Trusts, sec. 766; *Curling v. Austin*, 2 Drew. & S. 129; *Edgforth v. Armistead*, 2 Kay & J. 333; 25 L. J. Ch. 237; 4 Week. Rep. 279. Thus if a trust contemplates that the trustee will pay the grantor's debts: *Blatch v. Wilder*, 1 Ask. 419; *Winston v. Jones*, 6 Ala. 550; *Vallette v. Bennett*, 69 Ill. 632; *Barker v. Devonshire*, 3 Mer. 310; or will, if necessary, apply the body of the estate for the benefit or support of persons designated: *Ames v. Ames*, 15 R. L. 12; or will distribute the estate or its proceeds: *State v. Cincinnati*, 16 Ohio St. 170; a power of sale is implied. It has also been decided that where trustees were directed to divide property equally among seven persons,

and the property to be divided consisted chiefly of a single plantation that the grantor could not have intended that they should undertake to make a partition into seven equal parts, but that the power was best executed by a sale of the property and the division of its proceeds: *Winston v. Jones*, 6 Ala. 550. In truth, some of the courts have deemed trustees vested with an implied power to sell in instances in which it is doubtful whether the grantor ever contemplated the existence of such power. Thus in *Porter v. Schofield*, 55 Mo. 303, the purposes of the trust were to have and to hold real estate for the purpose of receiving and collecting the rents, issues, and profits, and after paying taxes and necessary expenses of repairing the same, to pay certain mortgages and judgments designated in the deed of trust. The trustee having sold the property for the purpose of realizing moneys with which to pay the indebtedness described in the deed of trust, the validity of the sale was affirmed, and the opinion of the supreme court expressing its views upon the subject was stated as follows: "The language of the deed does not, in express words, create the power to sell for the payment of the debts, but it is manifestly implied from the fact that the debts were charged upon the land, and the trustee was directed to pay them out of the rents and profits. As the rents and profits were wholly insufficient for that purpose, they must be looked upon only as one means of payment, and not as the only means. The property itself being bound for the debts, an implied power exists in the trustee to make the sale for that purpose, without resorting to the tedious and expensive process of a suit in chancery."

In the United States, the rule generally prevailing is, that the mere charge of the debts of a testator upon his lands by his will does not vest his executors with an implied power of sale. The only effect of this charge is to designate the portion of his property out of which his debts are to be paid. The remedy of his creditors remains, however, to be sought in the courts having jurisdiction of his estate, to which application must be made for the orders of sale requisite to carry out the intentions of the testator: *Hill v. Den*, 54 Cal. 21; *Will of Fox*, 52 N. Y. 530; 11 Am. Rep. 751; *Dumas v. Keeley*, 2 Dev. 484; *Wells v. Child*, 12 Allen, 333; *Harris v. Douglas*, 64 Ill. 466; *Cornish v. Wilson*, 6 Gill, 315; *Clark v. Riddle*, 11 Serg. & R. 311.

Though the instrument creating the trust does not authorize the sale of the trust property, courts of equity may, upon proper cause shown, and after bringing all of the parties in interest before them, decree a sale. And if the trust is brought before the court by a bill filed for its execution, it is said that the power of the trustee to make a sale is thereby suspended, and that he cannot thereafter sell without the sanction of the court: *Perry on Trusts*, secs. 764, 770, citing *Bush v. Bush*, 2 Duvall, 269; *Walker v. Smallwood*, Amb. 676; *Raymond v. Webb*, Loft. 66; *Drayson v. Pocock*, 4 Sim. 283; *Culpepper v. Aston*, 2 Ch. Cas. 116; *Reeside v. Peter*, 35 Md. 222.

Though the instrument creating the trust may not have authorized the trustee to sell the trust property, such authorization may have been attempted by the legislature. There is a very great difference between the authority of the legislature over the estate of a trustee and its authority over that of the *cestui que trust*. The title of the former is not a beneficial or vested interest. He holds it merely that he may perform duties imposed by the trust, and he can therefore be divested of it without being divested of any valuable or vested right of property. The legislature may therefore authorize a new trustee to be appointed, and to be invested with the legal title, subject to the trust upon which it was held by the original trustee: *Williamson v. Suydam*, 6 Wall. 723; *Cochran v. Van Surly*, 20 Wend. 365; 32 Am. Dec.

570. *Cestuis que trust*, on the other hand, have a beneficial interest in the subject-matter of the trust, which is, in general, no more subject to legislative control than if the legal estate were added to their equitable title, and the two estates united in one person. If the *cestuis que trust* are minors, or persons otherwise not competent to act for themselves, the legislature may, even by a special statute, authorize the sale of the trust property, and the application of the proceeds to their use and benefit; *Clarke v. Van Surley*, 15 Wend. 436; *Leggett v. Hunter*, 19 N. Y. 445; *Cochran v. Van Surley*, 20 Wend. 365; 32 Am. Dec. 570; *Williamson v. Berry*, 8 How. 495. Ordinarily, the legislature has no power to authorize one person to act for another who is competent to act for himself; and a special statute is void if it undertakes to authorize a sale of the property of one person by another, where no necessity is shown for such sale, and its object is merely to promote the supposed interest of the owners of the property by changing the form of investment; *Shoenberger v. School Directors*, 32 Pa. St. 34; *Brewer v. Grace*, 53 N. Y. 246; *Brennan v. Story*, 39 Cal. 179. It has been determined, in at least one state, that a special statute authorizing a trustee to sell land for the purpose of converting into money and dividing the proceeds among the *cestuis que trust* is valid; *Kerr v. Kitchen*, 17 Pa. St. 433. We think this decision to be unsound in principle, and that the proper rule is, that the legislature has no power, as against the wish of the beneficiaries of a trust, to authorize the trustee to sell the subject-matter of the trust, where such sale is not necessary to accomplish the purpose of the trust; *Powers v. Bergen*, 6 N. Y. 358.

A power of sale does not authorize a trustee to transfer the title for some other purpose. If his estate is in severalty, it will not justify him in exchanging the subject of the trust for other lands or property; *Ringgold v. Ringgold*, 1 Har. & G. 11; 16 Am. Dec. 259; *Mewer v. Dix*, 6 De Gex, M. & G. 703; *Fink v. Fink*, 16 N. J. Eq. 478; and though he is a tenant in common, his power of sale does not empower him to convert his estate into an estate in severalty by a voluntary partition; *Barnes v. Chalmers*, 4 De Gex, M. & G. 528; 16 Bear. 222; *Bradshaw v. Fane*, 3 Drew, 526. Even if he holds property which the instrument creating the trust directs to be divided among certain beneficiaries, the trustee is without power to make the division; *Naples's Estate*, 52 Pa. St. 154.

Though a trustee was originally invested with a power to sell, that power may have terminated, and if so, a sale by him is inoperative. We have already stated that the estate of a trustee is to be measured by the purposes and necessities of his trust. "The doctrine is well settled, that whatever the language by which a trust estate is vested in the trustee, its nature and duration are governed by the requirements of the trust. If it requires a fee-simple estate in the trustee, that will be created, though the language be not apt for that purpose. If the language conveys to the trustee and his heirs forever, while the trust requires a mere limited estate either in quantity or duration, only the latter will vest"; *Young v. Bradley*, 101 U. S. 782. It therefore follows that if the purposes of a trust have already been fully accomplished, the trustee can make no further sales or conveyances, because his estate is terminated and he has nothing to sell or convey. In the case last cited, land had been devised to trustees to hold, — 1. For the benefit of testator's widow during her life; 2. To divide the property among certain of his heirs, specified in the will; 3. To hold the shares of his daughters as a protection against their husbands, and for the children of these daughters, until the youngest of such children should attain the age of twenty-one years. After the testator's widow, and all other persons who could possibly

acquire any interest under this will, except the children of his son, had died, the trustee made a conveyance of the trust property, and such conveyance was declared void, because the estate of the trustee had terminated before the conveyance was made. This termination resulted from the fact that the trustee no longer had any duties to perform. He could not hold the property for the widow, for she was dead, nor to protect it against the daughters husbands, nor for the benefit of the daughters' children, for both the daughters and their children were also dead, nor for the purposes of partition, for all the property had become vested in the children of the testator's son, over whose interest the will gave the trustees no control.

If a trust has been created merely for the purpose of securing the payment of a debt, and the power of sale is to be exercised in default of such payment, the weight of authority favors the rule that the continued existence of the debt is essential to the continuation of the power of sale, and that a sale is void if made after the debt has been paid: *Penny v. Cook*, 19 Iowa, 538; *Mills v. Traylor*, 30 Tex. 7; *Murdock v. Johnson*, 7 Cold. 605; or after a tender of payment has been made: *Welch v. Greenidge*, 2 Heisk. 209; It is impossible for an intending purchaser to know with certainty whether or not a debt, to secure the payment of which a trust deed has been given, is fully paid. The application of this rule is attended with occasional hardships, but it is difficult to deny that the rule itself follows as an inevitable result of the other rule, that when the purposes of a trust have been fully accomplished the estate of the trustee ceases. The rule is also, in many instances, the logical and necessary result of another rule, to the effect that a power to sell upon default in the payment of a debt or other obligation makes such default a condition precedent to the existence of the power, and that the power can never precede the existence of such condition. Nevertheless, there are cases maintaining that a purchaser in good faith cannot be deprived of his purchase by showing that an accounting between the trustee and the debtor would result in the establishment of the fact that the debt had been fully paid: *Thompson v. McKay*, 41 Cal. 221.

The extinction of a debt by payment differs very substantially from the loss, through the operation of the statute of limitations, of legal remedies to enforce it. In the former case the debt no longer remains, while in the latter it continues, though resort to the courts to coerce its payment may be unavailing. If, however, real or personal property has been conveyed to a trustee, and he has been given power to sell it, and to apply the proceeds of the sale to the payment of a debt, the debt is not obliterated, nor are the trust and its attendant power terminated by the debt becoming barred by lapse of the time within which, under the statute, an action can be maintained thereon. The trustee may therefore proceed to sell, and no court will restrain the exercise of his power on the ground that the debt is barred: *Whitmore v. San Francisco S. U.*, 50 Cal. 145; *Grant v. Burr*, 54 Cal. 298.

Trust deeds, the sole purpose of which is to secure the payment of a debt due either to the trustee or to some other person designated therein, and which, therefore, are in most respects substitutes for mortgages, except that they are more harsh and summary in their operation, are sometimes viewed with both legislative and judicial aversion. In a few of the states, sales by trustees acting under powers conferred in deeds are not permitted, and a foreclosure in the courts is necessary: *Ingle v. Culbertson*, 43 Iowa, 265; *Campbell v. Johnston*, 4 Dana, 178; *Samuel v. Holiklay*, 1 Woolw. 400. But in the absence of any controlling statute, a trust deed differs from a

mortgage in three essential particulars: 1. It vests the legal title in the trustee, while in many of the states a mortgage is a mere lien, the legal title remaining in the mortgagor: *Bateman v. Burr*, 57 Cal. 481; 2. After a sale under and pursuant to a trust deed, the purchaser is immediately vested with a complete title, and the debtor has no opportunity to redeem: *Gillespie v. Smith*, 29 Ill. 473; 81 Am. Dec. 323; and 3. There is not only no necessity for a foreclosure, but the remedy by foreclosure does not exist, and therefore cannot be resorted to by the creditor or trustee: *Koch v. Briggs*, 14 Cal. 256; 73 Am. Dec. 651; *Grant v. Burr*, 54 Cal. 298; *Bateman v. Burr*, 57 Cal. 481.

If trustees are directed to sell within a time specified, the lapse of that time without their making any sale, where the necessity for the sale continues, appears not to terminate their power of sale. The designation of the time will, in most cases, be treated as directory merely, and a sale after the time named will be held valid: *Smith v. Kinney*, 33 Tex. 283; *Shatter's Appeal*, 4 Pa. St. 83; *Pearce v. Gardiner*, 10 Hare, 287; 1 Week. Rep. 98. If, on the other hand, a trustee is directed to sell after a specified time, or upon the happening of a designated event, the power to sell is not in being until the arrival of such time or the happening of such event, and a sale made by its authority is without support: *Booram v. Wells*, 19 N. J. Eq. 87; *Isham v. Delaware etc. R. R. Co.*, 11 N. J. Eq. 227. So a power to sell may be made contingent on other facts than the mere lapse of time, as where a trustee is authorized to sell only when it becomes necessary to do so to pay certain debts or charges, or to supply certain deficiencies, should such exist. The existence of the debts or charges, or the deficiency to be supplied, is regarded as a condition precedent to the existence of the power of sale: *Perry on Trusts*, sec. 785.

If there are two or more trustees, all must concur in the execution of the trust: *Sloo v. Law*, 3 Blatchf. 459; *Lipes v. Spear*, 4 Hughes, 535; *Naylor v. Goodall*, 47 L. J. Ch. 53; 37 L. T. 422; 26 Week. Rep. 162. If one, or any less number than all, undertake to make a conveyance, it is void, and does not even pass the legal title: *Ridgeley v. Johnson*, 11 Barb. 527; *Ham v. Ham*, 58 N. H. 70; *Learned v. Welton*, 40 Cal. 349; *Van Rensselaer v. Akin*, 22 Wend. 549; *Sinclair v. Jackson*, 8 Cow. 553; *Wilbur v. Almy*, 12 How. 180. *Contra*, *Perry on Trusts*, sec. 334; *Bourne v. Savage*, L. R. 2 Eq. 134. The fact that the deed creating the trust names two or more persons as trustees does not necessarily make them such. Some of them may renounce or disclaim the trust. "The person or persons thus renouncing thereafter stand in the same relation to the estate as though they had never been named as trustees, while those accepting are entitled to the estate in the same manner and to the same extent as though they only had been named in the grant or devise": *Freeman on Cotenancy and Partition*, sec. 45; *Zebach's Lessee v. Smith*, 3 Blinn. 69; 5 Am. Dec. 352; *Niles v. Stevens*, 4 Denio, 402; *Scully v. Reeves*, 3 N. J. Eq. 84; 29 Am. Dec. 604; *Flaniers v. Clark*, 1 Ves. 435; *Adams v. Taunton*, 5 Madd. 435; *Worthington v. Evans*, 1 Sim. & S. 165.

Where an estate is granted or devised to two or more, to hold in trust, there is no doubt that, at the common law, they take as joint tenants with the benefit of survivorship, and when one of them dies, that those surviving take the whole estate, and with it the power to execute the trust: *Freeman on Cotenancy*, sec. 44; *Osgood v. Franklin*, 2 Johns. Ch. 20; 7 Am. Dec. 513; *Peter v. Beverly*, 10 Pet. 564; *Burr v. Sim*, 1 Whart. 268; 29 Am. Dec. 48; *Jones v. Price*, 11 Sim. 567; 10 L. J., N. S., Ch. 195; 5 Jur. 719.

In the United States, various statutes have been enacted with the design

either of destroying estates in joint tenancy, or of limiting them to grants or devises in which it is expressly stated that the grantees or devisees shall hold as joint tenants. Some of these statutes except from their operation the estates of trustees. Independently of any express exception, it has been generally, though not universally, decided that they did not apply to estates held in trust, and therefore that the trustees surviving are always competent to execute the trust: *Freeman on Cotenancy*, sec. 43; *Parsons v. Boyd*, 20 Ala. 118; *Gray v. Lynch*, 8 Gill, 423; *Philadelphia & E. R. R. Co. v. Lehigh C. & N. Co.*, 26 Pa. St. 204; *Shotts v. Unanget*, 3 Watts & S. 45; *Stewart v. Pettus*, 10 Mo. 755. *Contra*, *Boston F. Co. v. Condit*, 19 N. J. Eq. 298; *Sanders's Heirs v. Morrison's Executors*, 7 Mon. 54; 18 Am. Dec. 161. Of course, the general rule that those who accept a trust or that the survivors of several trustees may execute it as all those originally named might have done, had all qualified or all survived, is inapplicable when the instrument creating the trust shows that in the event of death, resignation, or refusal to act, the vacancy thus occasioned must be filled before any further action is taken; but it has been decided that where surviving trustees have power to fill a vacancy, a sale made by them, without first supplying such vacancy, is valid: *Belmont v. O'Brien*, 12 N. Y. 494; *Golder v. Bressler*, 105 Ill. 419.

Ordinarily, the death of the person who created the trust cannot affect it in any way. In Virginia, however, where the object of a trust deed is merely to secure the payment of a debt owing from the grantor, it is thought improper for the trustee to proceed to sell after the death of the grantor, unless pursuant to an order of court: *Spencer v. Lee*, 19 W. Va. 172. If a person is styled a trustee, and authorized to sell, but is not vested with the legal title, his power is not coupled with an interest, and does not survive the death of the person for whom he was authorized to act: *Gardland v. Dunn*, 11 Ark. 720.

Where a conveyance, whether in contravention of the trust or not, is deemed valid as a transfer of the legal title, a trustee may doubtless convey by his attorney in fact: *May v. Fruee*, 4 Litt. 391; 14 Am. Dec. 159; *Underspie v. Smith*, 29 Ill. 473; 81 Am. Dec. 328; *Connolly v. Bell*, 5 Cranch C. C. 405. There is nothing in the mere execution of such a conveyance which requires the exercise of any personal trust or special judgment or discretion, and we see no reason why a conveyance may not be executed by a trustee, acting by his duly authorized agent, as well as in person, provided the grantee has at the time an absolute right to the conveyance, which the trustee has no discretion to refuse: *Hawley v. James*, 5 Paige, 489. If trustees have sold property pursuant to the terms of a trust, and have received the purchase price, they have no farther right or discretion in the matter, but are under the duty of executing a conveyance sufficient to vest the title in their vendee, and if they fail to do so, a court of equity may compel this performance of their duty in this respect: *Saunders v. Schmeble*, 49 Cal. 89.

Whenever a power is given, whether over real or personal estate, and whether coupled with an interest or not, so far as it reposes a personal trust or confidence in the donee of it to exercise his own judgment or discretion, he cannot execute it by another: Note to *May v. Fruee*, 14 Am. Dec. 179; *Saunders v. Webber*, 39 Cal. 287.

A trustee authorized to sell property under an instrument which does not contain any special directions as to the mode or time of sale must exercise his own judgment in determining the time and mode of sale, the notice to be given, the manner of conducting the sale, and whether the amount offered shall be accepted or not, or whether or not the sale shall be continued to

some other time or place. He cannot, with respect to any of these matters, delegate the exercise of his judgment or discretion to another: *Graham v. King*, 50 Mo. 22; *Howard v. Thornton*, 50 Mo. 291; *St. Louis v. Priest*, 88 Mo. 612. While he may employ agents to a limited extent, their employment should only be in the carrying out of what he has already determined upon. The judgment or discretion used must be his, though in accomplishing what his judgment has previously approved he may call others to his aid.

If a personal trust or confidence is reposed in two or more as trustees, neither can delegate his part or share of it to the other. Therefore, if one trustee executes a power of attorney, purporting to authorize his co-trustee to sell lands which are subjects of the trust, upon such terms and conditions as he should deem expedient, and the trustee so authorized makes an agreement to sell, signed by himself as trustee, and by him as attorney in fact of the other trustee, such agreement is not a due execution of the power to sell vested in the trustees, and cannot be enforced: *Berger v. Duff*, 4 Johns. Ch. 367; *Crewe v. Dicken*, 4 Ves. 97.

The mere mechanical duties connected with making a sale, such as posting the notices, receiving the bids, and acting as auctioneer, may be performed by agents of the trustee: *Gillespie v. Smith*, 29 Ill. 473; 81 Am. Dec. 328; *Kearney v. Dunn*, 58 Cal. 339; *Johns v. Sergeant*, 45 Miss. 332; and his agents may make contingent sales, subject to his subsequent ratification: *Hawley v. James*, 5 Paige, 487. So if the instrument prescribing the duties of the trustees contains directions concerning any act or acts to be done at or before the sale, which are so specific that the trustee has no discretion to exercise with reference to them, but must simply comply with such directions, he may have them complied with by his agent, with like effect as if done by himself: *Singleton v. Scott*, 11 Iowa, 589; *Pearson v. Jamison*, 3 McLean, 197.

There are authorities which support the conclusion that even though the acts done by an agent are such as the trustee had no right to delegate the doing of to another, yet that the trustee may subsequently ratify them by executing conveyances or otherwise, and that thereafter no sufficient cause of complaint against the sale exists. Thus where a trustee had a discretion to exercise in the selection of the day of sale and the paper in which the notice of sale should be published, and another exercised this discretion for him, but he attended and conducted the sale, it was decided that he thereby "adopted the selection made and time fixed, and the case must stand as if he had acted from the beginning by himself, instead of through another": *Singleton v. Scott*, 11 Iowa, 589. The correctness of this decision is questionable. The better view is one that requires the trustee to exercise in advance this discretion or judgment in the performance of the trust confided to him, and does not leave him at liberty to delegate the exercise of such judgment and discretion to an agent, with the power to make the acts of the agent valid merely by executing a deed, or otherwise manifesting his assent to what the agent has previously done. Thus it has been held that where a trustee was not present at a sale, he could not know whether or not it was fairly or fraudulently made, and the sale in his absence was therefore set aside: *Taylor v. Hopkins*, 40 Ill. 442. In several other cases a like conclusion was reached, that the trustee must be present during the entire sale: *Fuller v. O'Neal*, 69 Tex. 349; 5 Am. St. Rep. 59; *Spurlock v. Sproule*, 72 Mo. 503. In declaring invalid a sale made by an auctioneer, when the trustee was present just before the sale, and also just after it was completed,

but was on the opposite side of the street when it was actually made, the supreme court of Missouri said: "The counsel for the plaintiff contends, however, that such absence from the place of sale as that testified to by the trustee will not avoid the sale; that he was present at its conclusion to do all that he could have done had he been present at the actual crying of the sale. In this, we think, the learned counsel for the plaintiff is in error. It was the duty of the trustee to be present during the crying of the sale, to observe the progress thereof, protect the interests of the parties concerned, to reject fraudulent bids made to frustrate the sale, and, if necessary, to adjourn the sale: *Graham v. King*, 50 Mo. 22; *Bales v. Perry*, 51 Mo. 452; *Vail v. Jacobs*, 62 Mo. 130; *Perry on Trusts*, sec. 779, 780; *Gray v. Veira*, 33 Md. 18. If, however, the auctioneer may lawfully make a sale in the absence of the trustee, and should, during his absence, accept a bid, declare the person making the same to be the purchaser, and by a proper memorandum in writing complete the sale, it would be out of the power of the trustee to set such sale aside: *White v. Watkins*, 23 Mo. 427. And in this way the trustee might substitute the auctioneer for himself in the exercise of that very discretion which the law declares is a personal trust and cannot be delegated by him. The trustee himself should be present to sanction the acceptance of the bid by the auctioneer before any binding memorandum of the sale is made": *Brickenkamp v. Rees*, 69 Mo. 426. In New York, under a statute which provided that upon default in the payment of certain loans the title to property should vest in the loan commissioners, who should advertise and sell, it was decided that both of the commissioners must be present, and that a sale made by one of them, in the absence of the other, though after due notice, was not a valid execution of their power of sale; that one of the commissioners could not authorize the other to represent or act for him; and that the fact that both commissioners united in a conveyance purporting to be made in pursuance of the sale could not endow it with validity: *Powell v. Tuttle*, 3 N. Y. 396.

Whoever acquires title from a trustee when the instrument creating the trust shows the purpose for which the trustee holds the title, and the terms and conditions upon which he is authorized to sell and convey, must take notice of such terms and conditions, and can never maintain a claim of title, the maintenance of which is based upon his ignorance thereof. In other words, he is not an innocent purchaser, and his title must fail if it is shown that the contingency upon which the trustee was entitled to sell and convey has never occurred: *Hill v. Den*, 54 Cal. 21; *Huse v. Den*, 85 Cal. 399.

The creator of a trust, the trustee of which is to have a power of sale, may impose any restraint upon such power which he may consider proper, and unless it is in contravention of law, its observance is essential to the valid execution of the power. The restraint may be in regard either to the cause of sale or the proceedings to be pursued when a cause of sale exists. The power to sell may be in abeyance until the happening of some contingency, upon which, and not before, the grantor of the trust has declared it may or shall be exercised. In the absence of the contingency, there is no existing power of sale. Thus a trustee may be given power to sell, subject to the approval of the person who created the trust, or with the assent of the beneficiary, or of the tenant for life, or of some other person. If so, the power is not in being in the absence of such approval or assent, and any conveyance which the trustee may make is unwarranted: *Sprague v. Edwards*, 48 Cal. 239; *Mortlock v. Buller*, 10 Ves. 308; *Baleman v. Davis*, 3 Madd. 98; *Wright v. Wakeford*, 17 Ves. 454; *Rickett's Trust*, 1 Johns. & H. 70.

If the written consent of the beneficiary is required by the deed of trust, it must be obtained before making a sale: *Berrien v. Thomas*, 65 Ga. 61. But the fact that the *cestui que trust* joins in a conveyance of trust property will not validate a sale made by a trustee before the arrival of the time or the happening of the contingency on which he was authorized to sell: *Isham v. Delaware R. R. Co.*, 11 N. J. Eq. 227. Where the assent of the *cestui que trust* is necessary, it may be manifested by his joining in the deed made by the trustee: *Welton v. Palmer*, 39 Cal. 456; *Gindrat v. Montgomery Gas Light Co.*, 82 Ala. 596.

If the person whose assent to a trustee's sale is required dies without giving such assent, the power of sale never can become operative, because the assent cannot be dispensed with: *Kissam v. Dierkes*, 49 N. Y. 602; *Alley v. Lawrence*, 12 Gray, 373. If, however, it is clear that a sale at some time is necessary to accomplish the purposes of the trust, as where the trustee is directed to sell the trust property and to distribute the proceeds among the testator's children, and the children of his deceased children, and all the persons have died whose assent to the sale was required, a sale by the trustee without such assent is within his power, because the purposes of the creator of the trust will not be permitted to be thwarted and the trust to become unavailing by the accident of the failure of the persons named by him, in their lifetime, to give their assent to the sale of the property: *Leeds v. Wakefield*, 10 Gray, 514; *Sohler v. Williams*, 1 Curt. 479.

If a time is designated, on the arrival of which the trustees are directed to sell, as where a sale is to be made when a certain beneficiary reaches the age of majority, or on the happening of some other event in his life, a sale in advance of that time is unauthorized: *Styer v. Freas*, 15 Pa. St. 339; *Davis v. Howcote*, 1 Dev. & B. 460; *Jackson v. Lignan*, 3 Leigh, 161; *Loomis v. McClintock*, 10 Watts, 274.

If trustees are directed to sell an estate situate a A, and if its proceeds prove insufficient to pay the testator's debts, then to sell his estate at B, it is impossible for them to give good title to the estate at B until the estate at A has been sold, and the fact established beyond doubt that its proceeds are insufficient to pay the testator's debts: *Pierce v. Scott*, 1 Younge & C. 257; 4 L. J., N. S., Ex. Eq. 36. A power to sell after redemption from certain taxes has been made cannot exist before such redemption: *Devinney v. Reynolds*, 1 Watts & S. 332. If trustees authorized to sell to raise moneys to discharge obligations of a testator are required, before selling, to make oath of the amount due, this requisition creates a condition precedent, and the power of sale cannot be exercised in its absence: *Mason v. Martin*, 4 Md. 125. It has been held, in Pennsylvania, that notwithstanding directions given to trustees to sell at a particular time, as at the death of a testator's widow, a sale made before that time may be sustained, where it is evident that the object of postponing the time of sale to the period designated was to benefit a particular person, and that person has assented to the sale: *Gast v. Porter*, 13 Pa. St. 535; *Styer v. Freas*, 15 Pa. St. 339.

With respect to conditions precedent imposed by the creator of a trust, and the happening of which gives rise to a cause of sale, the rule of *caveat emptor* applies, and the purchaser must therefore ascertain at his peril whether a cause of sale exists or not: *Gunnell v. Cockerill*, 79 Ill. 79; *Griswold v. Perry*, 7 Lana. 98; *Hunt v. Townsend*, 31 Md. 336; 100 Am. Dec. 63.

It may be that trustees are vested by the terms in which the power of sale is expressed with authority to determine whether or not a condition precedent has arisen. If so, their determination is conclusive, unless it can be

shown to have been made in bad faith. Thus if they are to sell when, in their opinion, it becomes necessary to raise funds for a specified purpose, or when they deem it advisable, and in all other cases where it is manifest that they have been given discretion and judgment to be exercised, the purchaser need not stop to inquire whether or not they may have erred in the conclusion which they have reached in exercising it; for the creator of the trust has not made its exercise subject to review: *Barkdale v. Finney*, 14 Gratt. 338; *Rendleshan v. Meux*, 14 Sim. 249; *Bunner v. Storm*, 1 Sand. Ch. 357; *Champlin v. Champlin*, 3 Edw. Ch. 571; *Greer v. McBeth*, 12 Rich. Eq. 254.

A devise to trustees with full power and authority at any and all times to sell and dispose of the testator's estate or any part thereof, as they shall deem most expedient and for the best interests of all the legatees mentioned in the testator's last will and testament, does not authorize a conveyance to be made to one of the legatees of a portion of the real estate of the testator in payment of a debt due to him from such legatee, there being at the time sufficient personal property for the payment of the testator's debts, without calling upon his real estate for that purpose: *Russell v. Russell*, 36 N. Y. 591.

Unless it is clear that the trustees have been given power to determine the necessity of a sale, then a sale not needed to accomplish the purposes of a trust, or for a purpose for the accomplishment of which the trustees have not been given power to sell, is invalid. Thus where an estate was devised to the testator's wife for life, and if not sufficient to support her comfortably, then with power to sell any of his estate for that purpose, and she afterwards granted certain premises in fee, it was held that evidence was admissible for the purpose of avoiding this deed; that there was a sufficiency of personal estate for the support of the widow at the time the deed was executed: *Minot v. Prescott*, 14 Mass. 495.

Though a cause of sale exists, it may happen that the trustee, in proceedings looking to the making of the sale, fails to conform to the directions contained in the instrument creating the trust. Generally, these directions are also treated as conditions precedent to the proper and valid execution of the power of sale. "Public policy, as well as the stability of rules of property, demands that sales and titles founded thereon should not be avoided for slight and trivial reasons; but where a power has not been executed in accordance with essential conditions, the sale and deed will be held to be utterly void, both at law and in equity": *Powers v. Kueckhoff*, 41 Mo. 425; 97 Am. Dec. 281; *Eitelgeorge v. Mutual B. Ass'n*, 69 Mo. 55. "The authority to sell being derived from a power, it follows that a purchaser is bound to look for and to understand the extent of such power; or, as elsewhere expressed, 'taking under the power, he is bound to see that these terms are complied with.' And of course in this, as in all other contracts, the object and design of the parties should be kept strictly in view in ascertaining the nature and extent of the power. The authority and its exercise are matters of contract. In ascertaining whether the authority has been properly exercised or followed, it is not a question of jurisdiction, as in judicial sales, for it is not from the courts, but from the contract or agreement of the parties, that the power is derived": *Sears v. Livermore*, 17 Iowa, 297; 85 Am. Dec. 564. Hence, in the case last cited, it was held that under a trust deed requiring the notice of sale to be posted on the front door of a certain hotel, a sale made under a notice posted not on, but near such door should be set aside, though it appeared that the proprietor of the hotel would not permit the notice to be posted on the door. If the trustor directed the property to

be sold at public auction, it is not competent for the trustee to establish any other mode, though by so doing he may promote the interests of those for whom he acts: *Greenleaf v. Queen*, 1 Pet. 139. If a trust deed gives directions concerning the notice of sale, of the mode, place, or length of time of its publication, these directions must be substantially complied with, or the sale will be unauthorized: *Thornburg v. Jones*, 36 Mo. 514; *Reeside v. Peter*, 83 Md. 129; *Young v. Van Benthuysen*, 30 Tex. 762. If the deed authorizes a sale for cash, the trustee cannot sell upon credit; and if he does so, the sale may be set aside as void: *Cassell v. Ross*, 33 Ill. 244; 85 Am. Dec. 270. But a prohibition against sales on credit is not violated by a sale at which the vendee pays partly in cash and partly in notes given to the holders of liens, who accept such notes as cash: *Mead v. McLaughlin*, 42 Mo. 198.

The general statement, which we have frequently made herein, that a sale for a purpose not authorized by the instrument creating the trust is not within the power of sale vested in the trustee, and can therefore derive no support from such power, must not be understood as referring to a secret purpose of the trustee, existing either at the time of the sale or subsequently, to betray his trust, and to misapply or convert moneys in his hands, as the result of sales made pursuant to the trust. If the purchaser has notice of or participates in any misapplication of the proceeds of the sale, this fact certainly furnishes sufficient grounds for holding the purchaser personally liable to the beneficiaries or for the vacation of the sale, and perhaps for declaring it void: *Potter v. Gardner*, 12 Wheat. 493; *Grimsley v. Grimsley*, 79 Ga. 397; *Clyde v. Simpson*, 4 Ohio St. 445; and such notice may be inferred if the purchaser contracts to pay the purchase price in such mode that it may not be applied to the purposes of the trust: *Cardwell v. Cheatham*, 2 Head, 14; *Robb v. Flemmiken*, 29 S. C. 278.

Indeed, the English, and perhaps the American, decisions make it incumbent upon purchasers from trustees to see to the application of the purchase-money, if the instrument creating the trust shows that the money is to be paid immediately over to a certain person or persons, and no investigation or discretion is required upon the part either of the purchaser or of the trustee to ascertain who such person or persons are, or the amount which ought to be paid to each. In such a case, the persons so ascertainable and entitled to immediate payment are regarded as having an equitable title which cannot be divested by the trustee only, and it is the duty of the purchaser to call for their receipts, and failing to do so, their equitable title remains unimpaired until the actual payment to them of their share of the purchase-money, unless the settlor of the trust has in express terms declared that the receipts of the trustee shall be a sufficient discharge of the purchase-money, or used other words from which the power of the trustees to give receipts must be implied: *Forbes v. Peacock*, 12 Sim. 521; *Perry on Trusts*, sec. 790-793.

Where, on the other hand, a purchaser has no guilty knowledge, no notice of any intended wrong-doing on the part of the trustee, and the trustee is not under a duty to make immediate payment of the purchase-money to persons designated in the instrument creating the trust, or though, where under such duty, it is necessary for the trustee to make investigations, perhaps to take accounts, before he can determine to whom the money should be paid, then the purchaser is not affected by any misconduct of the trustee after receiving the purchase-money. This rule is equally applicable whether the duty of the trustee is to retain the proceeds of the sale for the use of the beneficiaries, or to reinvest them in other property, or to pay debts or other obligations not specifically enumerated or disclosed in the instrument creat-

ing the trust, or to improve other trust property: *Keister v. Scott*, 61 Md. 570; *Paulding v. Marvin*, 3 Redf. 365; *Hughes v. Tabb*, 78 Va. 313; *John v. Barnes*, 21 W. Va. 498; *Webb v. Chisolm*, 24 S. C. 487; *Conover v. Stothoff*, 38 N. J. Eq. 55; *Guill v. Northern*, 68 Ga. 345; *Steele v. Livesay*, 11 Gratt. 454; *Carrington v. Gaden*, 13 Gratt. 587; *Roper v. Hallifax*, 8 Taunt. 845; *Franklin Sav. Bank v. Taylor*, 131 Ill. 376; *Pennsylvania etc. Ins. Co. v. Austin*, 42 Pa. St. 257; *Hunt v. State Bank*, 2 Dev. 60; *Reidheimer v. Pyron*, 1 Speers Eq. 134; *Hauer v. Shore*, 5 Ired. Eq. 357; *Nicholls v. Peak*, 12 N. J. Eq. 69; *Gardner v. Armstrong*, 31 Mo. 535; *Wormley v. Wormley*, 8 Wheat. 421. The application of the purchase-money in these cases necessarily cannot be contemporaneous with the consummation of the sale, and therefore it is impossible for the purchaser to exercise any control over it. It becomes, therefore, a condition subsequent to the sale, and trustee's sales are not, as a general rule, avoidable for breaches of conditions subsequent on the part of the trustees of which the purchasers were innocent. "When the trust is defined in its object, and the purchase-money is to be reinvested upon trusts that require time and discretion, or the acts of sale and reinvestment are contemplated to be at a distance from each other, the purchaser is not bound to look to the application of the purchase-money; for, as it is said, 'the trustee is clothed with discretion in the management of the trust fund, and if any persons are to suffer by his misconduct, it should be rather those who have reposed confidence than those who have bought under an apparently authorized act': *Norman v. Towne*, 130 Mass. 52.

As already suggested, if the trust, as expressed in the instrument creating it, shows that funds, when realized from sales, may or shall remain in the hands of the trustee, to be by him used or paid for purposes disclosed by the trust, the settler must be regarded as having confided to the trustee the duty of seeing to the proper application of such funds, and therefore to have exonerated the purchaser from exacting receipts from the beneficiaries, or from otherwise protecting their interests. If lands are devised to a trustee charged with the payment of an annuity, first to testator's son for life, and at his death then to and among his child or children during the life or lives of the survivor of them, and the trustee is also authorized to convey any part of the estate devised, the purchaser cannot be expected to see that such annuity shall be paid to the party or parties from time to time entitled thereto; and therefore his title cannot be impaired by the fact that, through subsequent investments by the trustee, or from unexpected depreciation in values, nothing remains in the hands of the trustee out of which to pay the annuity. In determining this question in *Hughes v. Tabb*, 78 Va. 313, the court made the following general summary of the law regarding the duty of purchasers in connection with the application of the proceeds of sales of trust property: "The rule is, that wherever the trust is of a defined or limited nature, the purchaser must himself see that the purchase-money is applied to the proper discharge of the trust; but wherever the trust is general, and of an unlimited nature, he need not see to it; 2 Story's Eq. Jur., sec. 1131; 1 Lomax's Digest, 302-304; *Potter v. Gardner*, 12 Wheat. 498. There is much reason in the doctrine that where the trust is defined in its object, and the purchase-money is to be reinvested upon trusts which require time and discretion, or the acts of sale and reinvestment are manifestly contemplated to be at a distance from each other, the purchaser shall not be bound to look to the application of the purchase-money; for the trustee is clothed with a discretion in the management of the trust fund, and if any persons are to suffer by his misconduct, it should rather be those

who reposed confidence than those who have bought under an apparently authorized act: Opinion of Justice Story in *Wormley v. Wormley*, 8 Wheat. 442; Sugden on Vendors, c. 11, sec. 1. So when a sale is made by trustees under a power to sell and reinvest upon the same trusts, it has been held in America that the purchaser is not bound to see to the application of the purchase-money: 2 Story's Eq. Jur., sec. 1134, and authorities there cited. If the form of the bequest implies a confidence reposed in the trustee in regard to the application of the purchase-money, in all such cases it is unreasonable to require the purchaser to look to the application of the purchase-money; and this is a principle which will ultimately mark an intelligible distinction among the cases in regard to the question: 2 Story's Eq. Jur., sec. 1134. When the time has arrived for the sale of the real estate, and the persons entitled to the money are infants or unborn, then the purchaser is not bound to see to the application of the purchase-money, because he might thus be implicated by a trust of long duration: 13 Pick. 392; 5 Irish Eq. 357; 10 Pa. St. 267. But if an estate is charged with a sum of money, payable to an infant at his majority, then the purchaser is bound to see the money duly paid; there the person is named, *in esse*, and the day is fixed and designated, the trust is defined and limited; while if a sum of money is to be paid to persons yet unborn, and from year to year, to require the purchaser to see to it, at his personal peril, that the said sum of money is paid to the proper person or persons *in esse*, and that may be hereafter born, and be entitled during the lifetime of each and all until all are dead, would be to defeat the sale in such a case altogether, and defeat the purposes of the will. What purchaser would buy land if he had to guard the safety of the investment of the proceeds for, it might be, a hundred years, when he, and possibly his children, should be dead? And if he did so buy, and such were his duties, it would be practically to substitute him to the duties, cares, and responsibilities of the trustee, and that without compensation. These are some of the most important and nice distinctions which have been adopted by courts of equity upon this interesting topic; and as a distinguished author has observed, they lead strongly to the conclusion to which eminent jurists and also eminent judges have arrived, that it would have been far better to have held in all cases that the party having the right to sell had also the right to receive the purchase-money, without any further responsibility on the part of the purchaser as to its application: 2 Story's Eq. Jur., sec. 1133."

"If the trust is to pay debts generally, the purchaser cannot be subject to the rule that he shall see to the application of the purchase-money; or if the trust is to pay debts and legacies, or to pay a particular debt and all other debts, or to pay legacies, or to pay debts, and to apply the balance to the support of some one, there can be no obligation to see to the payment of debts and legacies. Such a trust must necessarily require time, and the investigation of long accounts and vouchers; the purchaser could know neither the creditors nor the amounts. Where debts and legacies are to be paid, the debts must first be paid; and as the purchaser can be under no obligation to examine into the debts, so he cannot be required to take any action in regard to the legacies; and if one debt is named, but is coupled with others not named, the same considerations apply. In such trusts, the testator must be presumed to have intended that his trustee should have the full power to give receipts for the purchase-money, in order to apply it to the purposes pointed out": Perry on Trusts, sec. 796.

From the authorities already considered, it follows that the duty of the purchaser of property sold by virtue of a power of sale invested in a trustee

to see to the proper application of the purchase-money is limited to those cases in which it is the duty of the trustee to at once pay a specified debt or debts, legacy or legacies, or to distribute such proceeds among specified beneficiaries, who are ascertainable from an inspection of the instrument creating the trust, and who are themselves competent to receive and receipt for the sums to which they are respectively entitled: *Andrews v. Spyrhanok*, 13 Pick. 393; *Elliott v. Merryman*, 1 Lead. Cas. Eq., 4th Am. ed., 74. While there are cases assuming that the English rule upon this subject prevails in the United States: *Hughes v. Tabb*, 78 Va. 313; *St. Mary's Church v. Stockton*, 8 N. J. Eq. 520; *Wagner v. Blanchet*, 27 N. J. Eq. 356; *Ohyde v. Simpson*, 4 Ohio St. 445; yet there are grave doubts of its applicability, under our laws regulating the settlement of the estates of decedents, to executors to whom lands have been devised in trust, with power to sell: *Perry on Trusts*, sec. 798; and we have been unable to discover any American case in which a purchaser from a trustee, whether an executor or not, having power to sell, has either lost the benefit of his purchase, or been held liable to any beneficiary under the trust, where the purchaser has been himself free from all notice of and all complicity in the trustee's misapplication of the proceeds of the sale; and we feel that when a case shall arise in which the question is necessarily involved, and the purchaser has acted in entire good faith, that the courts will hesitate to apply the English rule. The vice of that rule is, that it makes the purchaser either exercise the functions of the trustee or become answerable for the manner in which the latter exercises them. In many instances, trust deeds are made to perform the functions of mortgages. Persons, both natural and artificial, having moneys to loan, select other persons to act as trustees, cause the legal title to be conveyed to them, by conveyances in which they are given power to sell, whenever default shall be made in payment of the debt. These trustees have, through these powers of sale, means to coerce the debtor into the payment to them of the debt mentioned in the trust deed, and in the absence of such payment, to cause a sacrifice of the property, if intending purchasers are not encouraged to rely upon the authority of the trustees without investigating the relations between the creditors and their trustees. The trustees are selected by the creditors, and ought to be treated as their agents, and payments made to them either by the purchaser after or by the debtor before a sale ought to be treated as exonerating the purchaser or debtor from all further liability to the creditor.

If the instrument creating a trust has not given special directions as to the manner in which the trustee is to act, or the mode or means by which or the time when he is to bring about a sale, he must exercise his best judgment for the promotion of the interests of the beneficiaries under the trust. Anything which tends to sacrifice their interests is manifestly in derogation of the trust, and a sale resulting from it will undoubtedly be set aside on an appropriate complaint preferred by the parties prejudiced thereby. The trustee must obtain the best price he can, and any contract by which he seeks to dispose of the trust property, or any part thereof, for less than he has been offered by other parties, will be set aside: *Harper v. Hays*, 2 Giff. 210; 6 Jur., N. S., 645; 8 Week. Rep. 600.

In order to secure the best price obtainable, the trustee may defer the time of sale, and he is not bound to proceed at once when to do so would probably result in his realising a price substantially less than could be procured by waiting until a more opportune time: *Harbison v. Alston*, 4 Ired. Eq. 137. Only in a case of absolute necessity should the trustee proceed to sell when it is apparent that a sacrifice of the property must ensue: *Hunt v. Buss*, 2 Dev.

Eq. 291; 24 Am. Dec. 274. A trustee must always act impartially, and as far as possible for the advantage of all the parties interested in the sale, and use reasonable efforts to obtain the best price he can: *Livory v. Winston*, 30 W. Va. 555; *Muller's Adm'r v. Stone*, 84 Va. 834; 10 Am. St. Rep. 889. Where the mode and time of his action are not regulated by the instrument creating the trust, all that can be said in the way of prescribing a rule for his government is, that he shall act in good faith, and adopt those modes of proceeding which will render the sale most beneficial to the debtor, or other persons whose interests are to be affected thereby: *Tatum v. Holliday*, 59 Mo. 422; *Chasey v. Chasey*, 49 Mo. 540.

The duty of a trustee to act impartially between all the parties interested in the execution of the trust, and not to needlessly sacrifice these interests, may often require him to take some affirmative action before proceeding with the sale. If there is any cloud upon the title, or any other existing cause, the operation of which might be such as to prevent competition at the sale, it is his duty, where he can, to proceed to remove such cause, as by application to a court of equity to clear away the cloud from the title, or to remove any other impediment which may exist to a fair and reasonable sale of the property. "That a trustee is considered as the agent of both parties, and bound to act impartially between them, that it is his duty to use every reasonable effort to sell the estate to the best advantage, and that it is his duty to apply to a court of equity where there is a cloud upon the title, or where there is doubt or uncertainty as to the amount to be raised, or as to prior encumbrances on the trust subject, or where there is a conflict between the creditors, or in any case in which the aid of a court of equity is necessary to remove impediments in the way of a fair execution of his trust, are propositions which none will deny, and which have been repeatedly affirmed by this court: 1 Lomax's Digest, 323; *Lane v. Tulball*, Gilman, 130; *Gay v. Hancock*, 1 Rand. 72; *Miller v. Argyle's Ex'r*, 5 Leigh, 460; *Williams v. Gordon*, 11 Leigh, 547; *Miller v. Trenbun*, 2 Rob. (Va.) 1; *Bryan v. Stamp*, 8 Gratt. 241; 56 Am. Dec. 139; *Bozett v. Fisher*, 11 Gratt. 492; *White v. Mechanics' Building Fund Ass'n*, 22 Gratt. 233; *Shurtz v. Johnson*, 28 Gratt. 657; 2 Minor's Institutes, 286; 1 Barb. Ch. Pr. 447. And it is equally well settled that if the trustee fails in any such case to apply to a court of equity, the party injured by his default may do so. The rule is well stated by Judge Burks in *Shultz v. Hensbrough*, 33 Gratt. 567, as follows: 'If a trustee in pais, with power to make sale of real estate for the payment of debts, attempts to make such sale while there is a cloud resting on the title to the property, or there is any doubt or uncertainty as to the debts secured or the amounts thereof, or a dispute or conflict among the creditors as to their respective claims, a court of equity, on a bill filed by the debtor, secured creditor, subsequent encumbrancer, or other person having an interest, will restrain the trustee until these impediments to a fair sale have, by its aid, been removed as far as it is practicable to do so': *Muller's Adm'r v. Stone*, 84 Va. 834; 10 Am. St. Rep. 889; *Ryan v. Stamp*, 8 Gratt. 241; 56 Am. Dec. 140.

Though it is the duty of the trustee not to sacrifice the property, it does not follow that a sale is either necessarily void or voidable because of the inadequacy of the price realized. When the trustee is under no immediate necessity of selling, and there is no other object in the sale than to exercise his discretion of changing the form of the investment from real estate to personal, the fact that he sold it at a palpably inadequate price would, no doubt, be very persuasive evidence of fraud, such as would induce a court of equity to vacate the sale on prompt application by the parties interested. But there

are many cases in which it is the duty of the trustee to make sales for the purpose of discharging the claims of creditors and others who are entitled to immediate payment, and where it may be the duty of the trustee to proceed, either at once or with reasonable celerity, although the times and circumstances are not propitious for the sale of the subject-matter of the trust. In such cases, mere inadequacy of price, standing alone, is not a sufficient ground to authorize the vacation of the sale: *Carter v. Abshire*, 48 Mo. 300; *Clark v. St. Louis, Alton, etc. R. R. Co.*, 58 How. Pr. 21. The rule with respect to vacating trustee's sales for inadequacy of price is very similar to that which the courts apply to judicial sales, and is substantially as follows: that mere inadequacy alone, unless so gross as to indicate unfairness on the part of the purchaser, or misconduct or fraud on the part of the trustee, does not warrant the vacating of the sale; but where there is a serious inadequacy in the price realized, the court will seize upon any incident of surprise, undue advantage, irregularity, or other equitable circumstance to grant relief: *Warefield v. Ross*, 38 Md. 85; *Horsey v. Hough*, 38 Md. 130; *Meath v. Porter*, 9 Heisk. 224.

If the property to be sold consists of two or more lots, or if not already divided into lots it can be so divided, then the trustee must exercise his discretion to sell either in bulk or in subdivisions, as may best promote the interests to be subserved by the sale: *Gray v. Shaw*, 14 Mo. 341; *Stall v. Macalester*, 9 Ohio, 19. Under ordinary circumstances, there can be no doubt that such interests will be best promoted by a sale in parcels; and where it appears probable that they have been sacrificed by a sale *en masse*, it will be vacated: *Chesley v. Chesley*, 54 Mo. 347; *Goode v. Comfort*, 39 Mo. 313; but a sale of property in gross is not necessarily, nor even presumptively, invalid. "While it is true that sales of this character will be narrowly watched, and every possible safeguard thrown around the interest of him who has been truly called 'a servant to the lender,' yet the mere fact that the property conveyed by deed of trust is sold in gross is not, *per se*, sufficient to avoid the sale, and no case that I am aware of has gone to that length. There must be some attendant fraud, unfair dealing, or abuse by the trustee of the confidence reposed in him, or some resulting injury from a sale made in this way, in order to obtain the aid of a court of equity to divest a title thus acquired": *Bankendorf v. Vincenz*, 52 Mo. 441. A sale *en masse* is neither void nor voidable unless its operation is prejudicial to some one. "It is only upon the ground of fraud, or that some one may have been prejudiced by a sale of real estate *en masse*, that the sale would be set aside in equity because the property was not sold in separate parcels": *Gillespie v. Smith*, 29 Ill. 473; 81 Am. Dec. 328.

To prevent the sacrifice of property, a trustee may fix a reserve price, and refuse to accept any bid of a less sum: *In re Peyton*, 8 Jur., N. S., 453; 31 L. J. Ch. 440; 10 Week. Rep. 515; 6 L. T., N. S., 883; 30 Beav. 252. If a bid has been made under a misapprehension of the terms of the sale, as where the bidder supposed his bid to be payable in currency, and the trustee was not willing nor under any duty to receive anything but gold, the trustee may permit such bid to be withdrawn, and may subsequently proceed to sell to another bidder: *Waterman v. Spaulding*, 51 Ill. 425. Nor is the trustee, though the sale is at public auction, bound to accept every bid which may be offered. He has the discretion to refuse any bid the acceptance of which would frustrate the purposes of the sale: *Gray v. Veirs*, 33 Md. 18.

If the discretion of a trustee has not been limited by the instrument creating the trust, he is not bound to give any notice of his intention to sell, but

may dispose of the property at private sale, and without notice, as though he were selling his own private property: *Burr v. McEwen*, Baldw. 164; *Minuse v. Cox*, 5 Johns. Ch. 441; 9 Am. Dec. 313; *Huger v. Huger*, 9 Rich. Eq. 217; *Mattos v. Eberhart*, 38 Ga. 581; *Crowe v. Reeder*, 22 Mich. 322; provided that, in adopting the means of sale, he acts in good faith, and not in a manner obviously prejudicial to the beneficiaries of the trust. If, on the other hand, the instrument creating the trust has given directions concerning the mode of sale, they must be substantially pursued. Any direction regarding the notice of sale is material, and the trustee is not at liberty to disobey it. His sale, made without complying with it, will, in most jurisdictions, be regarded as either absolutely void, or as liable to be vacated upon complaint of any person interested in the execution of the trust. Conditions as to the time or mode of publication must be followed, and in some courts, at least, no excuse will be received for not observing them: *Sears v. Lincroft*, 17 Iowa, 297; 85 Am. Dec. 564. If a trust deed exacts thirty days' notice of a sale, and the sale does not take place at the time specified in the notice, it has been held that if it is adjourned to another time, thirty days' notice must also be given of such adjourned sale: *Thornton v. Boyden*, 31 Ill. 200. If notice to a grantor of the time and place of a sale is stipulated for in the trust deed, the giving of such notice is a condition precedent to the validity of the exercise of the power of sale: *Henderson v. Galloway*, 8 Humph. 692.

The requirement of twenty days' previous notice of the time and place of sale is not satisfied by a single publication made twenty days before such sale: *Stine v. Wilkison*, 10 Mo. 75. Publication of a notice of sale in a weekly newspaper on the 8th, 15th, 22d, and 29th of April, and on the 6th of May, the sale being on the 8th of May, complies with the directions in a trust deed that the trustees may sell after "first giving thirty days' notice of the time, place, and terms of the sale, and of the property to be sold, by advertisement in some newspaper in Burlington, Iowa territory," there being no paper published in Burlington oftener than once a week: *Lester v. Armstrong*, 4 Iowa, 482; 68 Am. Dec. 672. In this case, it will be observed that there were less than thirty days between the first and the last publication, though there were more than thirty days between the first publication and the time of sale. In a similar case it was held that publication in a weekly newspaper was sufficient, though there was a daily edition of the same paper, in which no publication was made: *Campbell v. Tagge*, 30 Iowa, 307; and the rule seems to be well settled that publication in a weekly newspaper is always sufficient, unless the trust deed has expressly required a publication at more frequent intervals: *Johnson v. Dorsey*, 7 Gill, 269. Notices of sale are not required to be published on Sunday. Therefore, if notice is directed to be given ten days before the sale, the publication may be sufficient, though owing to an intervening Sunday it was published only nine times: *Cushman v. Stone*, 69 Ill. 516. When a notice of sale is required to be posted, it is no objection to the posting that it was in a place where the notice could not be seen on Sundays. The law does not contemplate that notices of sale shall be exposed on those days: *Graham v. Fitts*, 53 Miss. 307. If thirty days' notice of the time and place of sale is directed to be given by posting, and the original posting is correctly made, the direction is fully satisfied, though it appears that the notice, owing to no fault of the trustee or purchaser, did not remain up for the full time: *Graham v. Fitts*, 53 Miss. 307.

If a trust deed, while it directs notice of sale to be given, is silent with respect to the newspaper in which it is to be published, the trustee has

unlimited discretion in the selection of such paper, except that he must not yield to the influence of fraud, nor of any other improper motive: *Singleton v. Scott*, 11 Iowa, 589.

Every notice of sale "should contain such facts as are reasonably to apprise the public of the place, time, and terms of the sale, and of the property to be sold. But mere omissions or inaccuracies in these respects, not calculated to mislead and work prejudice, will not be regarded": *Powers v. Kueckhoff*, 41 Mo. 425; 97 Am. Dec. 281; *Cheesley v. Cheesley*, 49 Mo. 540; *Stephenson v. January*, 49 Mo. 485; *Beatty v. Butler*, 21 Mo. 313; 64 Am. Dec. 224. Though a statute prescribes the form of a notice, failure to use the precise language of such statute will not invalidate a notice: *Boston Safe Deposit and Trust Co. v. Mixer*, 148 Mass. 100. Misrecitals in a notice of acts on which the power of sale does not depend, and which are not required to be recited, are immaterial: *Irist v. Antioch College*, 126 Ill. 474; 9 Am. St. Rep. 638. It is not necessary to follow any prescribed or stereotyped form in giving a notice of sale: *Newman v. Jackson*, 12 Wheat. 570. There is no reason why the amount of the debt should be stated, when the object of the sale is to raise moneys to discharge it: *Winsall v. Rosa*, 4 Port. 321. A notice stating that a sale will be held at the court-house door of a designated town, but not naming the county, nor stating that the sale will be at public auction, is sufficient, where the notice also states the time of sale and describes the property to be sold: *Powers v. Kueckhoff*, 41 Mo. 425; 97 Am. Dec. 281. A notice which does not state by nor to whom a deed of trust was executed, nor describe the land with sufficient particularity to enable one not familiar with it to know what land was to be sold, is insufficient, and a sale made thereunder will be vacated: *Realside v. Peter*, 33 Md. 120.

Manifestly the objects to be accomplished by a notice of sale are to advise the public of what is to be sold, and the time when, the place where, and the terms upon which it may be bought; and the essentials of a notice of sale under a trust deed are therefore a statement of the time, place, and terms of sale, and such a description of the property to be sold as, if read by persons familiar with the neighborhood, will advise them of what is to be sold, and upon what terms it can be bought, and induce them to attend the sale as prospective bidders, should they feel an inclination to invest in the property to be sold. It is generally advisable to state the authority under which the sale is to be made, that intending purchasers may know whose property is to be sold, and by what right the trustees claim to act, so that such purchasers may have opportunity to investigate the title and authority of the trustee, and determine for themselves whether the sale is one at which they can safely purchase. If the terms of the sale are different from those implied by law, or from those which are usual in like sales in the neighborhood, as where they are especially advantageous or especially onerous to purchasers, they should be stated also; but we doubt whether, under ordinary circumstances, it is indispensable in a notice of sale to set forth anything except the time and place of sale and a correct description of the property to be sold.

If a trustee is left entirely to his discretion regarding a sale, he may sell for cash or upon credit, as to his own judgment may seem best: *Rogers v. De Forest*, 7 Paige, 273; *Hoffman v. Mackall*, 5 Ohio, 124; 61 Am. Dec. 637; but if the instrument describing his duties and powers gives explicit directions upon this subject, he must not disregard them, and if he sells upon credit, when he is commanded to sell for cash, the sale may be set aside: *Cassell v. Ross*, 33 Ill. 244; 85 Am. Dec. 270.

The trustee himself and those who are acting in his interests are the only persons who are incompetent to purchase property at a trustee's sale. A beneficiary under the trust may be a purchaser at the sale of the trust property as freely as if he were a stranger to the trust, and is under no obligation to hold the property so purchased for the benefit of his fellow-beneficiaries, if any there be: *Walker v. Braggard*, 13 Smedes & M. 723. If a power of sale is to be exercised only with the assent of the tenant for life, this does not disqualify him from becoming a purchaser at a sale made by the trustee: *Discomson v. Talbot*, 19 Week. Rep. 138; Com. L. Ch. 22; 24 L. T. 40.

The decisions concerning the purchase of trust property by or in the interest of the trustee, whose duty it was to sell it, are very numerous, and not altogether free from conflict. The vast majority of them, however, sustain the following propositions: 1. That a purchase by a trustee, or in his interest, is not necessarily or absolutely void; *Stephens v. Beall*, 22 Wall. 329; *Union State Property v. Tilton*, 69 Me. 244; *Veasey v. Graham*, 17 Ga. 99; third persons cannot question it; *McNish v. Pope*, 8 Rich. Eq. 112; nor has the trustee a right to treat it as void; it is binding upon him until the *cestui que trust* chooses to avoid it; *McClure v. Miller*, 1 Bail. Ch. 107; 21 Am. Dec. 522; 2. That a trustee has no right to purchase trust property either directly or by the purchase of a third person acting at his instigation and intending to hold the purchase for his benefit; *Michoud v. Girod*, 4 How. 503; *Campbell v. Johnston*, 1 Sand. Ch. 145; *Boyd v. Hawkins*, 2 Ired. Eq. 304; *Mathews v. Dragaud*, 3 Desaus. Ch. 25; *Thorp v. McCullum*, 6 Ill. 614; *Davis v. Simpson*, 5 Har. & J. 147; 9 Am. Dec. 500; *Saltmarsh v. Beene*, 4 Port. 283; 30 Am. Dec. 525; *Renew v. Butler*, 30 Ga. 954; *Ranick v. Butterfield*, 31 N. H. 70; 64 Am. Dec. 316; *Den v. Wright*, 31 N. H. 175; 11 Am. Dec. 548; *Sheldon v. Sheldon*, 13 Johns. 220; *Obert v. Hammett*, 19 N. J. L. 73; *Bank of Orleans v. Torrey*, 7 Hill, 260; and 3. That a *cestui que trust* may within a reasonable time after discovering that trust property was sold to a trustee, or to some one acting in his interest, or in the interest of his wife, or to a corporation or association in which he is largely interested, elect either to treat the sale as void and the property as still subject to the trust, or to have an accounting and payment of the profits realized by the trustee and his agents; *Bassett v. Shoemaker*, 46 N. J. Eq. 538; *post*, p. 435; *Robbins v. Butler*, 24 Ill. 287; *Hunt v. Bass*, 2 Dev. Eq. 292; 24 Am. Dec. 274; *Jennison v. Hapgood*, 7 Pick. 1; 19 Am. Dec. 258; *Herr's Estate*, 1 Grant Cas. 272; *Rosenberger's Appeal*, 28 Pa. St. 67; *Smith v. Frost*, 70 N. Y. 65; *McNeil v. Gates*, 41 Ark. 264. Only when a sale is made under the authority of the court, or with the concurrence of a *cestui que trust*, and the purchase by or in the interest of the trustee is known to the court confirming or the beneficiary approving the sale, or when the trustee is one of the persons for whose debt the trust deed was given, will such purchase be permitted to stand as against an objecting beneficiary; *Kennedy v. Dunn*, 68 Cal. 339; *Faucett v. Frucett*, 1 Bush, 511; 89 Am. Dec. 639; *Oensherland etc. Co. v. Sherman*, 20 Md. 117; *Ames v. Port Huron etc. Co.*, 11 Mich. 139; 83 Am. Dec. 731; *Roberts v. Roberts*, 65 N. C. 27. It has also been held that a trustee cannot as an agent of a third person purchase the trust property, for the obvious reason that if he did so he would undertake to discharge conflicting duties, and probably sacrifice the interests of one or the other of his principals; *Hawley v. Cramer*, 4 Cow. 717; *Gould v. Gould*, 36 Barb. 270. Where there are two or more trustees, each is as much prohibited from purchasing the trust property as if he were sole trustee; *Risingold v. Risingold*, 1 Har. & G. 11; 27 Am. Dec. 250.

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est of his trustee, and of his right to disaffirm it, elects to ratify such purchase, he is irrevocably concluded by such ratification, and the sale is thereafter not subject to successful assault at law or in equity: *Boerum v. Schenck*, 41 N. Y. 182; *Van Dyke v. Johns*, 1 Del. Ch. 93; 12 Am. Dec. 76.

If when a trustee made a sale he had no interest therein, and no intention of becoming the owner of the property in his own right, his trust relation to it ceases, and he may subsequently deal with it as discharged from the trust, and may therefore purchase it from its owner without incurring any obligation to hold it subject to the original trust: *Oreveling v. Fritts*, 34 N. J. Eq. 134; *Rammelsberg v. Mitchell*, 29 Ohio St. 22. If, on the other hand, the original sale was in the interest of the trustee, and he, after selling the property to innocent purchasers, who might have held it discharged from the trust, acquires their title, he may be compelled to hold it for the benefit of the beneficiaries of the trust: *Osarch v. Osarch*, 25 Pa. St. 278.

While the authorities often state, in general terms, that a sale to the trustee by whom the power of sale was exercised is not void, but voidable only, they must be understood as referring only to sales in which he was the real, though not the nominal, purchaser. If a sale or conveyance appears on its face to be made by a trustee to himself, it must, we apprehend, be treated as absolutely void, for want of proper contracting parties. "The deed would be simply void, and would pass nothing or make no change in the situation and relations of the parties, on the ground that no man can contract with himself, or make a deed to himself, or from himself in one capacity to himself in another": Perry on Trusts, sec. 602 w.

When an executor or other trustee purchases the trust property, or causes a purchase thereof to be made in his interest, and the *cestui que trust* elects to disaffirm the sale within a reasonable period after receiving notice of the trustee's interest therein, he need not make any proof of fraud or unfairness on the part of the trustee, or even that the sale, if it were permitted to stand, would be unjust to the complainant. A trustee cannot sustain a sale and hold the property free of the trust otherwise than by proving that the sale was made by the previous assent or the subsequent ratification of the *cestui que trust*, given with a full knowledge of his rights and of the circumstances of the sale, and of the trustee's interest therein. If the latter did not so assent to or ratify the sale, and he wishes it to be set aside, no inquiry will be made respecting its fairness or its unfairness. He has an absolute right to have the trustee discharge the duties of the trust impartially and without ever placing himself in a position where his interests and those of his beneficiary may come in conflict: Note to *Van Dyke v. Johns*, 12 Am. Dec. 85; *Scott v. Freeland*, 7 Smedes & M. 409; 45 Am. Dec. 310; *Michoud v. Girod*, 4 How. 503.

The sale must be made by the trustee, he having, as we have seen, no power to delegate his trust, but the trustee who makes the sale is not necessarily the one originally designated by the creator of the trust. A new trustee may have been appointed by some court of competent jurisdiction, in which case he may exercise the same power of sale possessed by the former trustee, though the order making the appointment is silent upon that subject: *Lakey v. Kortright*, 56 N. Y. Super. Ct. 527. One or more of the original trustees may have disclaimed, died, or resigned, in which event the survivor becomes the sole trustee, and competent to act as if no other trustee had ever been joined with him.

If the trust estate was limited to the trustee and his heirs, it will on his death vest in such heirs, but cannot vest in his devisees or other assigns: Perry on Trusts, sec. 494. If it was limited to the trustee, his

heirs or assigns, it may be devised, and the devisees may execute the trust: *Hall v. May*, 3 Kay & J. 585; 3 Jur., N. S., 907; 26 L. J. Ch. 791; 5 Week. Rep. 869; *Osborne v. Rowlett*, L. R. 13 Ch. Div. 774; 49 L. J. Ch. 310; 42 L. T. 650; 28 Week. Rep. 365. Where the trust is a matter of personal confidence, while the estate may, on the death of the trustee, vest in his heirs or devisees, and be by them held subject to the trust, yet they are not regarded as competent to execute it: *Robson v. Flight*, 4 De Gex, J. & S. 608; 34 L. J. Ch. 226; 11 L. T., N. S., 725; *Perry on Trusts*, sec. 496. Resort to a court of equity, therefore, in such cases, becomes necessary to obtain the appointment of proper trustees to carry out the trust.

Though a trustee has given notice that he will sell the trust property at a designated time and place, he may reach the conclusion that a sale at such time or place is not for the best interests of the persons to be affected by the sale, or that from some other cause the sale ought not to take place as advertised. "The power of a trustee to sell at public auction, after a certain publication of the notice of the time and place of sale, includes the power regularly to adjourn the sale to a different time and place, when, in his discretion, fairly exercised, it shall seem to him necessary to do so in order to obtain a fair auction price for the property": *Richards v. Holmes*, 18 How. 143; *Jackson v. Clark*, 7 Johns. 225; *Sayles v. Smith*, 12 Wend. 57; note to *Russell v. Richards*, 26 Am. Dec. 537. It is the duty of a trustee to exercise the power which he has to adjourn sales whenever, from the small attendance of bidders or from other circumstances, it seems apparent that a sale of the property is likely to result in its realizing a much less sum than if the sale were adjourned to another time or place: *Judge v. Booge*, 47 Mo. 544.

While the right and the duty of a trustee to adjourn a sale in certain contingencies are well established, it is impossible to state with confidence what notice, if any, he must give of such adjournment. Undoubtedly he must not postpone a sale in such a way that the persons interested do not know that it has been adjourned, nor at what time or place they must attend to protect their interests: *Dana v. Farrington*, 4 Minn. 433. Perhaps the better opinion is that when a sale is adjourned, notice of the time and place to which it is adjourned must be given in the same manner and for the same length of time as if the sale were advertised for the first time. The result of this is, that if any adjournment is ordered, it must be for a time sufficient to allow notice to be given for the length of time stipulated in the trust deed or other instrument regulating the time and manner in which the trustee must give notice before he proceeds to sell any part of the trust estate: *Griffin v. Marine Co.*, 52 Ill. 130; *Thornton v. Boyden*, 31 Ill. 200; *Montgomery v. Barrow*, 19 La. Ann. 169; *Enloe v. Miles*, 12 Smedes & M. 147; *Patten v. Stewart*, 26 Ind. 395.

If the bidder to whom the trustee sells property at public auction does not comply with his bid, it may be again offered for sale, but under ordinary circumstances, the second sale must be preceded by notice given in the same manner and for the same time as required for the first: *Barnard v. Duncan*, 38 Mo. 170; 90 Am. Dec. 425; *Judge v. Booge*, 47 Mo. 544; *Givan v. Doe*, 5 Blackf. 280; *Williams v. Barlow*, 49 Ga. 530. Certainly this must be so where the persons in attendance at the sale, or any considerable portion of them, have dispersed. For in such a case the benefit of the original notice is lost, and any sale of the property will almost surely be for a price disproportionate to its value.

Every conveyance by a trustee must possess the requisites of a conveyance by a grantor conveying in his own right. Therefore, it must name or de-

scribe the grantee; and if it merely purports to relinquish the interest of the trustee without stating to whom, it is inoperative: *Dick v. Pitchford*, 1 Dev. & B. Eq. 480. While it is desirable that a conveyance executed by a trustee in the exercise of a power of disposition vested in him should contain recitals from which it is apparent that he executed it in his capacity of trustee, and for the purpose of exercising the power vested in him as such, and that the circumstances under which he is entitled to execute the power in fact exist, still it cannot be said that any of these recitals are absolutely necessary. It is sufficient for him to describe himself or affix his signature as trustee: *Porter v. Schofield*, 55 Mo. 303. He need not recite the trusts under which he holds the property, nor state that his conveyance is for the purpose of executing those trusts: *Bradstreet v. Clarke*, 12 Wend. 602; nor need he affirm the existence of debts or of any other cause making his sale or conveyance necessary or proper: *Flax v. Bert*, 31 L. T., N. S., 645; 23 Week. Rep. 228. If the only estate or interest which the trustee has in the property is one which he holds in trust, and he makes a conveyance which describes and purports to convey property which is subject to the trust, and the conveyance must either operate to convey the trust estate or not operate at all, then it will be construed as being executed in the exercise of the power vested in him as trustee, and will convey the trust property therein described, though it does not refer to the capacity in which he holds such property, nor to his intention to execute the power of sale vested in him as such trustee: *Gindrat v. Montgomery Gas Light Co.*, 82 Ala. 596; 60 Am. Rep. 769; *Bishop v. Remple*, 11 Ohio St. 277; *Hall v. Preble*, 68 Me. 100; *Baird v. Boucher*, 60 Minn. 329; *South v. South*, 91 Ind. 221; *Campbell v. Johnson*, 65 Mo. 439; *Funk v. Eggleston*, 92 Ill. 315; *Orr v. O'Brien*, 55 Tex. 149. "The donee of a power may execute it without expressly referring to it, or taking any notice of it, provided that it is apparent from the whole instrument that it was intended as an execution of the power. The execution of the power, however, must show that it was intended to be such execution; for if it is uncertain whether the act was intended to be an execution of the power, it will not be construed as an execution. The intention to execute a power will sufficiently appear, — 1. When there is some reference to the power in the instrument of execution; 2. Where there is a reference to the property which is the subject-matter on which execution of the power is to operate; and 3. Where the instrument of execution would have no operation, but would be utterly insensible and absurd, if it was not the execution of a power. Thus if a donee of a power to sell land have also an interest in his own right in the same land, his deed of the land, making no reference to the power, will convey only his own interest; for there is a subject-matter for the deed to operate upon, excluding the power, and therefore as it does not conclusively appear that the deed was intended to be an execution of the power as well as a conveyance of the grantor's interest in the land, it will be held not to be an execution of the power; but if the grantor has no interest in the land, his deed will be insensible, and a mere absurdity, if not intended as an execution of the power; therefore it will be held to be an execution of the power if it refers to the subject-matter of the power, or describes the land over which his power extends. It will be seen that this last conclusion is a presumption of law; this presumption may be more or less strong, according to all the circumstances of the case and the condition of the property. If all the words of a deed or will can have an effect given to them, and an operation upon property or rights, without being taken as the execution of a power, they will not be an execution of such power. If a man has several powers, and refers to some, and not to others, the execution

will exclude those not referred to": *Perry on Trusts*, sec. 511 c; *Terry v. Rodahan*, 79 Ga. 278; 11 Am. St. Rep. 420.

While a conveyance by a trustee may operate as a valid execution of a power of sale vested in him, though it contains no recitals, and does not disclose the capacity in which he conveys, yet a careful conveyancer, in draughting a conveyance for a trustee, will not only show the capacity in which he executes it, but will also recite the existing facts which make its execution proper. These recitals have a value beyond removing any doubt which might otherwise exist in reference to the object of the deed and the capacity in which its grantor is acting. They are, in many jurisdictions, at least *prima facie* evidence of the truth of the statements therein made, and therefore may be of great assistance to the grantee and his successors in interest in subsequent legal controversies assailing his or their title on the ground that the circumstances did not exist in which the trustee was authorized to make the conveyance in question: *Savings and Loan Society v. Deering*, 66 Cal. 281; *Beal v. Blair*, 33 Iowa, 318.

The effect of sales irregularly, improvidently, or fraudulently made by trustees has been incidentally considered in what we have already written, and therefore but little additional space will here be given to this topic. We showed, in the first part of this note, that, in absence of statutes modifying or abrogating the common law upon this subject, conveyances by trustees, whether authorized or not, operate upon the legal title and vest it in their grantees. Where this rule still prevails, one who wishes to avoid the effect of a trustee's conveyance must necessarily resort to a suit in equity to have such conveyance vacated and the property declared to be still subject to the trust. It is part of the peculiar jurisdiction of courts of equity to superintend the execution of trusts, and to prevent the violation by the trustee of the confidence reposed in him. A trustee's sale may be vacated in equity, either because of some circumstance or element of fraud, improvidence, or unfairness in it, whereby the interests of the *cestui que trust* have been sacrificed, or because of the failure of the trustee to comply with the directions of the trust deed, as where he has sold when not authorized to do so, or although authorized to sell, has not, in bringing about the sale, observed the directions of the trust deed regarding the time, place, or mode of sale.

Every device which a trustee may adopt to bring about a sale in the interest of himself, or in any way to stifle competition, or to prevent the realization of the full value of the property, is fraudulent, and therefore demands a decree setting aside the sale: *Saltmarsh v. Beene*, 4 Port. 283; 30 Am. Dec. 525; *Towle v. Amba*, 123 Ill. 410; *Cassell v. Ross*, 83 Ill. 244; 85 Am. Dec. 270; *Hackett v. Fournay*, 120 Ill. 493. Mere inadequacy of price, as we have seen, is not a sufficient reason for vacating a sale, unless it is so gross as to shock the conscience or create a presumption of fraud: *Clark v. Trust Co.*, 100 U. S. 149; *Basnett v. Higgins*, 2 W. Va. 485; *Booker v. Anderson*, 36 Ill. 66; or of want of reasonable judgment and discretion on the part of the trustee: *Hintz v. Stingal*, 1 Md. Ch. 283; *Johnson v. Dorsey*, 7 Gill, 269; *Gibbs v. Cunningham*, 1 Md. Ch. 44; but any circumstance of fraud or irregularity will be accepted by the court as sufficient ground for setting aside a sale for a clearly inadequate price: *Singleton v. Scott*, 11 Iowa, 589; *Franklin v. Osgood*, 14 Johns. 527; *Hoppes v. Cheek*, 21 Ark. 585. If the debtor, or other person interested in the sale, is, by any device or misrepresentation on the part of the trustee or purchaser, prevented from attending the sale, or taking other measures necessary for the protection of his interests, equity will grant him relief: *Clarkson v. Creely*, 35 Mo. 95;

Hoppes v. Cheek, 21 Ark. 585. While a sale of several parcels of trust property en masse is not, in the absence of fraud or prejudice to the cestui que trust, a sufficient cause for vacating the sale: *Gillespie v. Smith*, 29 Ill. 473; 81 Am. Dec. 323; yet it will not be permitted to stand if it is clearly shown that a sale in separate parcels would have brought a much higher sum: *Goode v. Comfort*, 39 Mo. 313.

As illustrations of cases in which a trustee's sales ought to be vacated, disregarded, or adjudged invalid in equity, either because he had no power to sell at the time when he undertook to do so, or because, in proceeding to bring about a sale, he disregarded the directions of the instrument creating the trust, or the mandates of the law regulating his duties and defining his powers, may be mentioned the following: A sale made by and in the presence of part only of the acting trustees: *Powell v. Tuttle*, 3 N. Y. 396; *Sprulock v. Sproule*, 72 Mo. 503; a sale made under a trust deed before default had been made in the payment of the debt, upon which default the trustee was authorized to sell: *Eitelgeorge v. Mutual H. B. Ass'n*, 69 Mo. 52; a sale conducted by an auctioneer at which the sole trustee was not present: *Bickenkamp v. Rees*, 69 Mo. 426; *Vail v. Jacobs*, 62 Mo. 130; a sale made without publishing the notice of sale for the period required by the trust deed: *Stine v. Wilkison*, 10 Mo. 75; a sale made without the consent of the cestui que trust, or other person whose assent was exacted by the trust deed: *Berrien v. Thomas*, 65 Ga. 61; *Kissam v. Dierkes*, 49 N. Y. 602; a credit sale, when the trustee was authorized to sell for cash only: *Cassell v. Ross*, 33 Ill. 244; 85 Am. Dec. 270; a sale made without posting the notice thereof at the place designated in the trust deed: *Sears v. Livermore*, 17 Iowa, 297; 85 Am. Dec. 564; a sale made under a deed of trust, after the debt to secure which such deed was given had been paid: *Penny v. Cook*, 19 Iowa, 533.

When suit is brought in equity for relief from a trustee's sale, the court will, of course, be governed by the general principles of equity jurisprudence, and will often, because of those principles, deny relief, though the sale may have been improper or unauthorized. Thus want of diligence on the part of the complainant is in equity frequently fatal to his cause. This is especially true when he is endeavoring to annul a trustee's sale. Cestui que trust, and other persons for whose benefit such sales are made, have the right to let them stand and to retain whatever advantage may result to them therefrom, though they are irregular, unauthorized, or fraudulent; and if such persons, after having knowledge of circumstances entitling them to avoid such sales, delay for an unreasonable period to take any action whatever, they thereby manifest their election to waive such fraud, irregularity, or want of authority, and once having elected to make such waiver, their election is irrevocable: *Landrum v. Union Bank*, 63 Mo. 48; *Connolly v. Hammond*, 51 Tex. 635; *Follansbe v. Kilbreth*, 17 Ill. 522; 65 Am. Dec. 691; *Irish v. Antioch College*, 126 Ill. 474; 9 Am. St. Rep. 638. If the cause urged for vacating a sale occurred through the act or procurement of the complainant, or if he, though not guilty of bringing about such cause, knew of its existence at or prior to the sale, and being present at the sale, neglected to disclose the cause of complaint or to make any objection to the sale, he is probably estopped from subsequently urging it as a ground for vacating the sale: *Spencer v. Hawkins*, 4 Ired. Eq. 288; *Beede v. De Bann*, 8 Ark. 510.

It is a well-settled rule of equity that where the equities are equal, the legal title prevails. This rule, if applied in favor of the grantees of trustees, must protect them from all causes of complaint, of which they were innocently ignorant at the time of paying the purchase price and receiving their

conveyances; and we have no doubt that it should be applied in all cases where the vice in the trustee's proceedings is one which the purchaser had no reason to anticipate, and does not consist of an act or omission forbidden by the instrument creating the trust: *Booraem v. Wells*, 19 N. J. Eq. 87. Where a statute forbade the enforcement by a trustee of any claim purchased after his appointment, it was held that a trustee's sale could not be avoided on the ground that at the time of the sale he was the assignee of the debt for the payment of which the sale was made, there being no claim that the purchaser was aware of such assignment: *Carey v. Brown*, 62 Cal. 373. So where power is given a trustee to sell property to pay debts of the trustor, without specifying to whom he was indebted, a bona fide purchaser will be protected if the trust is abused by a sale when there were no debts remaining to be paid: *Williams v. Otey*, 8 Humph. 563; 47 Am. Rep. 632; *Loughmiller v. Harris*, 2 Heisk. 559. A purchaser at a trustee's sale cannot be prejudiced by a secret agreement between the trustee and the debtor that a part of the land described in the trust deed should be released therefrom on certain conditions which had been complied with by such debtor: *Powers v. Kueckhoff*, 41 Mo. 425; 97 Am. Dec. 281.

If, as already stated, an irregular or fraudulent trustee's sale, or one made without authority, is valid until the person injured thereby elects to disprove it, then, in all actions or proceedings in which the title to the property is assailed, it must follow that no person who is a stranger to the trust can question such sale and the conveyance made in pursuance thereof. Hence, as a general rule, a stranger to a deed to trustees cannot complain of informalities, irregularities, or frauds in the execution of the power therein conferred: *Marston v. Rowe*, 43 Ala. 271; *Herbert v. Hewrick*, 16 Ala. 581; *Gary v. Colgin*, 11 Ala. 514; *Larco v. Casanueva*, 30 Cal. 560. These decisions can, however, be justified only by the assumption that the trustee's sale and conveyance were not void; for if void, he who claims under them is a stranger to the title, and certainly cannot be entitled to any right or remedy, even as against a third person, to which he would not be entitled had such sale or conveyance not been attempted to be made. In those states the statutes of which denounce conveyances in contravention of a trust as void, it may be that a conveyance executed by a trustee may be attacked collaterally, in any action and by any person, on the ground that it was in contravention of the trust, and is therefore without any effect, legal or equitable: See *ante*, p. 268. Except where a statute of this kind is invoked, we apprehend that the rule best supported by principle and authority is, that a trustee's deed is not subject to attack in an action at law, and that no evidence need be offered in its support, and that it must be received as a conveyance of the legal title, and that those who seek to controvert it must do so by alleging and establishing some equitable reason why, as against them, it should not prevail: *Rosson v. Lamb*, 4 G. Greene, 468; *Reece v. Allen*, 10 Ill. 236; 48 Am. Dec. 336.

Statements made in various decisions, and in different parts of this note, that a conveyance made by a trustee having the legal title and the power to sell and convey is invalid or void, for designated defects, must generally be understood to mean void when assailed in equity by some appropriate proceedings, and under such circumstances that there is no equitable reason or impediment requiring the denial of relief to the complainant. There are, however, decisions proceeding upon the assumption that the conveyances there in question were void at law. Thus in *Thornburg v. Jones*, 36 Mo. 514, a complaint against a trustee to recover damages from him for selling the trust property without publishing the notice of sale in two counties, as

required by the trust deed, and for wrongful, oppressive, and fraudulent conduct, whereby bidders were deterred from bidding, was adjudged to state no cause of action, for the reason that a sale, as therein alleged, was void, both at law and in equity, and could therefore occasion no damages. In *Minot v. Prescott*, 14 Mass. 496, which was an action of ejectment, the defendants claimed under a conveyance from Mary Betton, to whom the income of the property in controversy had been devised for her life, with power to sell such property if the income was not sufficient to support her comfortably, it was decided that parol evidence was admissible to defeat her conveyance by proving that the income was sufficient for her support, and therefore that the condition precedent, giving her power to convey, had never happened. But it must be remembered that she was not a trustee; that the testator did not devise his realty to her, in trust or otherwise; and that when she made the conveyance, she had neither an estate to convey, nor a power to convey the estate of others.

Trust deeds made merely for the purpose of securing the payment of debts due, or to become due, from the trustee, may, with much reason, be regarded as exceptional in their character, and the power of the trustee to convey even the legal title as being dependent on his substantial compliance with the conditions imposed by the conveyance to him. Thus in Texas it has been settled that a grantor of a trust deed of this class "holds the title to the land, i. e., the full title, legal and equitable, subject to the lien created by the instrument for the payment of the debt"; that the grantor and those succeeding to his estate have a right to the possession, and for most purposes, the legal title; that a conveyance made by the trustee in a mode, at a time, or under circumstances not authorized by the trust deed is inoperative at law as well as in equity: *Fuller v. O'Neal*, 69 Tex. 349; 5 Am. St. Rep. 59; *Duty v. Graham*, 12 Tex. 427; 62 Am. Dec. 534; *Mills v. Traylor*, 30 Tex. 11; *Young v. Van Benthuysen*, 30 Tex. 762.

The courts of some of the states have made a distinction between the original purchaser at a trustee's sale and persons subsequently acquiring title under him. Whatever may be the rules in those states as to the original purchaser, their courts hold that subsequent purchasers may rely upon the recitals in the trustee's deed, and if those recitals support the authority of the trustee to sell and convey, they are conclusive in favor of such subsequent purchasers, unless they acquired their title with notice of the frauds or defects complained of: *Gunnell v. Cockrill*, 79 Ill. 79; *Cassell v. Ross*, 33 Ill. 244; 85 Am. Dec. 271; *Wilson v. South Park Commissioners*, 70 Ill. 46; *Hamilton v. Lubukee*, 51 Ill. 415; *Streits v. Hartman*, 26 Neb. 33. With respect to the original purchasers, the above cases assume that, as against them, the conveyances under consideration would have been set aside in equity, though such assumption was not necessary to the determination of any of the cases. There are other cases in which the general rule is stated to be that the original purchasers from trustees must ascertain, at their peril, the existence of the facts authorizing the trustees to sell and convey, and in which the statement is something more than a *dictum*: *Sears v. Livermore*, 17 Iowa, 297; 85 Am. Dec. 564. So far, however, as these cases have fallen within our observation, the original purchasers were parties for whose benefit, or in payment of whose debt, the sale was made, or who had notice at the time of their purchase of the irregularity complained of. Therefore we hesitate to accept the rule under consideration as applicable even as against the original purchasers when they were not interested in the sale and they purchased in good faith, while innocently ignorant of the act or omission

of the trustee which is urged to invalidate his conveyance. In favor of such purchasers we think the equitable maxim must be applied, that where the equities are equal, the legal title prevails.

Respecting the presumptions arising for or against one claiming under a conveyance from a trustee, the authorities are exceptionally meager. In all those jurisdictions in which the rule prevails that such a conveyance always operates upon the legal title, no question could arise in actions at law regarding these presumptions; for the conveyance, if sufficient in form, would vest the title in the grantee, and if insufficient, would not so vest it, and in either event there would be nothing for or against which any presumption could operate: *Keesler v. Burke*, 81 Ill. 436; *Reece v. Allen*, 10 Ill. 236; 48 Am. Dec. 336. So far as the courts have spoken at all upon this topic, what they have said tends to sustain the rule "that a presumption is to be indulged that the trustee did those acts *in pais* which were conditions precedent to a valid sale by him, and that the burden of showing the contrary is on those who question the validity of the sale": *Graham v. Fitts*, 53 Miss. 307; and the principal case. The deed of trust may declare that if the trustee conveys, the recitals in his deed shall be evidence of the facts therein recited, in which event no doubt such recitals as he may make pertinent to the execution of his power are *prima facie* evidence in favor of the purchaser: *Carter v. Ashbire*, 48 Mo. 300. In some cases it seems to have been taken for granted that because a deed of trust, by so stipulating, may make the recitals in any deed made by the trustee evidence of the facts therein recited, a deed without such a stipulation leaves the trustee without authority to make recitals which shall be competent evidence, and that his grantee must offer other evidence to show that such recitals are true: *Neilson v. County of Chariton*, 60 Mo. 384; *Fall v. Jacobs*, 62 Mo. 130; *Wood v. Lake*, 62 Ala. 489; *Gibson v. Jones*, 5 Leigh, 376. This is certainly a mistaken view. The recitals made by the trustee surely must be taken as at least *prima facie* evidence of the existence of the matters therein stated: *Savings and Loan Soc. v. Dearing*, 66 Cal. 281; *Beal v. Blair*, 23 Iowa, 318.

EHREMAN v. HOSKINS.

[57 MISSISSIPPI, 192.]

WILLS. — PAROL EVIDENCE IS NOT ADMISSIBLE TO PROVE THAT A TESTATOR INTENDED to devise a different lot from that described in his will, and that his intention was not correctly expressed in the will, owing to a misapprehension of the draughtsman as to the lot intended to be described.

EJECTMENT to recover possession of a house and lot in Vicksburg. Both parties claimed title under H. L. Bond, the defendant as his devisee, and the plaintiffs as successors in interest of his heirs. The will, under which the defendant claimed, devised to her, for the period of her natural life, a lot of land in Vicksburg, described as "that part of lot 56 in square 11, on the original plat of Vicksburg, commencing at the southeast corner of said lot on Munroe Street, and running thence north along said street twenty feet and ten and one

half inches, thence east ninety-five feet, thence south twenty feet and ten and one half inches, thence west ninety-five feet to the place of beginning, it being the property originally deeded to Henry L. Bond by Martha Knox, and registered in book FF, page 409, of the records of Warren County, Mississippi." By another clause in the same will, the defendant was given, for life, "all the household and kitchen furniture now contained in or on the foregoing premises"; and the will still further provided "that she shall not be disturbed by any person in the peaceful possession of her present home by this will devised." At the time the will was executed, the defendant lived with the testator in a house the greater part of which was on the lot here in controversy, and which was bought from one French, although a part or wing of the house extended on the lot bought from Martha Knox, but the room actually occupied by the defendant was on the French lot. The draughtsman of the will testified that when he was called to prepare the will, the testator instructed him to provide that the defendant should have the home, stating, "I want to give her this home as long as she lives." Being asked for a description of the lot, the testator answered that the draughtsman could get it from the recorder's office, and that it was the same lot bought from Martha Knox. The draughtsman accordingly obtained the description found in the deed from Martha Knox. The lot in controversy in this case was, however, adjacent to the Martha Knox lot, and had been purchased by the testator from Uriah French, and the contention of the defendant was, that the evidence of the draughtsman of the will was competent, and that it showed an intention on the part of the testator to devise the home or French lot, though by mistake the Knox lot was the one specifically described in the will. Judgment for the defendant; plaintiffs appealed.

L. W. Magruder, for the appellants.

Gibson and Bien, for the respondent.

CAMPBELL, J. The effect of the testimony admitted by the court over the objection of the appellants was to substitute for the will made by the testator that which the witnesses endeavored to show he really intended to make, and as to which he failed by mistake of the drawer of the will. It is not allowable to do this, as to which all the books agree. The case which goes furthest towards abrogating the settled rule on this subject is *Patch v. White*, 117 U. S. 210, and even that does

not sustain the admissibility of the evidence in this case. The dissenting opinion of four of the justices in that case is a sufficient answer to it, if the facts of this case were the same as in that; but they are not. Here the testator devised to the appellee a parcel of land by an accurate description, except as to the initial point, and parol testimony was received to show that he really intended to give her, not what is described in the will, but another parcel of land. This was not to apply the will made, but to make one different from that made.

Reversed, and remanded.

WILLS—PAROL EVIDENCE. — Parol evidence is inadmissible to prove that the testator intended to devise property different from that expressly mentioned in the will: *Judy v. Gilbert*, 77 Ind. 96; 40 Am. Rep. 289, and note 292-295; for parol evidence is never proper to show what a testator intended to write in his will: *Sturgis v. Work*, 122 Ind. 134; 17 Am. St. Rep. 349, and note 354. Compare *Phillips v. Ferguson*, 85 Va. 509; 17 Am. St. Rep. 78, and note.

JONES v. JONES.

[87 MISSISSIPPI, 195.]

DIVORCE—JURISDICTION. — THE COURTS OF THIS STATE HAVE JURISDICTION in a suit for divorce, the cause for which occurred in another state, if the plaintiff has resided in this state for one year next preceding the filing of his complaint, and has not acquired such residence for the purpose of obtaining a divorce under its laws.

Suit for divorce, brought by a wife against her husband, who was a non-resident of the state. Service of process was made by publication, and the evidence showed that both the marriage and the cause for divorce occurred in the state of Alabama. The trial court thereupon dismissed the complainant's bill, and she appealed.

Walker and Hall, for the appellant.

WOODS, C. J. This appeal presents for our determination this single question, viz.: Have the courts of this state jurisdiction in suits for divorce, where the causes for divorce occurred in another state?

The laws of this state, in their general application, must regulate and control the domestic relations of all persons resident within its borders. If the *lex domicilii* shall be held not to govern in matters of divorce in this state, even in those cases where the causes for divorce occurred in another state, we will inevitably find certain startling and intolerable anom-

alies confronting us. 1. We shall see the statutes of this state, as they affect the domestic relations of the citizens, applied and enforced in every conceivable case, except only in the most important matter of marriage and divorce. 2. We shall witness the substitution of foreign laws for our own in the determination of the rights of parties holding marital relations. 3. And we shall see, consequently, a part of the citizens in divorce proceedings having their rights determined by our own system of law, and another part of our citizens, in like proceedings, denied the benefits of our laws administered in our own courts, and remanded to foreign laws administered in a foreign jurisdiction. The adoption of the views entertained by the learned court below would lead to perplexing confusion; would deny to residents — nay, in readily imagined cases, to life-long citizens — the protection of the laws of the state in matters of tenderest and highest concern; and would, as in the case before us, compel the innocent and the injured to remain indissolubly bound to the vicious and the guilty. It appears to us, therefore, that the public welfare and the private interests of citizens render it obligatory upon the courts of the state to administer our own laws as they affect the vital subject of marriage and divorce.

An examination of our statutes on this subject manifests to us that the legislature wisely determined that every person who has resided in this state for one year next preceding the filing of a bill for divorce, and who has not acquired such residence for the purpose of obtaining a divorce under our laws, is fairly entitled to invoke the benefits and the protection of our laws on this most important subject. The only essential legislative prerequisite to suitorship in divorce proceedings is a *bona fide* residence in this state of one year. To this there is no limitation nor any exception. The legislative will has imposed no condition of residence here on the part of the defendant, no condition of the execution of the marriage contract here, and no condition, in our opinion, of causes for divorce occurring here.

We are therefore of the opinion that the court below erred in dismissing complainant's bill, and in denying her the relief prayed for.

Reversed, and remanded.

DIVORCE—JURISDICTION. — As to the jurisdiction over non-residents in suits for divorce, see *Jones v. Jones*, 108 N. Y. 415; 2 Am. St. Rep. 447, and note 453, 454; *Estate of Newman*, 75 Cal. 213; 7 Am. St. Rep. 146, and note.

In *Heath v. Heath*, 42 La. Ann. 437, it was decided that when the matrimonial residence and domicile were in Massachusetts, and in that state a wife abandoned her husband, and subsequently he came to Louisiana, acquiring a residence, but the wife refused to come to the latter state, the husband cannot sue for a divorce in Louisiana on the ground of abandonment.

HOFF v. ROGERS.

[67 MISSISSIPPI, 208.]

A PARTNER, PART OWNER, OR TENANT IN COMMON CANNOT MAINTAIN AN ACTION AT LAW FOR THE JOINT PROPERTY AGAINST ANOTHER CO-OWNER. Hence if a partner makes a trust deed of the firm property to secure the payment of his individual debt, and the trustee obtains possession, the other partner has no remedy at law, and must resort to equity for redress.

T. H. AND H. C. ROGERS, in December, 1887, became partners in conducting planting operations for the year 1888. The premises upon which such operations were to be conducted had been leased by H. C. Rogers to T. H. Rogers, in December, 1885, for the term of three years, and the latter had delivered his lease to one Block, but without the knowledge of H. C. Rogers. Under the partnership agreement of December, 1887, H. C. Rogers advanced a large sum on account of the firm, and also quite a sum to H. C. Rogers personally. On January 9, 1888, T. H. Rogers executed a trust deed to one Hoff for the benefit and security of Block, which covered the lease and also all the crop which might be grown on the leased premises for the year 1888. This trust deed was recorded three days after its date, but H. C. Rogers had no actual notice of it until January, 1889, at which time the trustee sued out a writ of replevin against T. H. Rogers, who was in possession of the larger portion of the crop. After the trustee had obtained possession in this action, H. C. Rogers interposed his claim for the property replevied, and judgment was given in his favor.

Cassedy and Ratcliff, for the appellant.

C. P. Neilson and Robert Lowry, for the appellee.

CAMPBELL, J. A result was reached in this case which a chancery court would approve, but under our execrable system of separate administration of law and equity, the successful party must be deprived of his victory, because obtained in a court of law, when it should have been in a court of chan-

cery. The case made by the evidence is that of a partnership between H. C. Rogers and T. H. Rogers, for the planting operations of the year 1888, and a deed of trust by T. H. Rogers to Block for his individual debt. Replevin was brought against T. H. Rogers, who was in possession of the cotton, and a recovery had against him by the trustee in the deed of trust. H. C. Rogers, the injured partner, brought replevin, when he should have resorted to chancery; for one partner, or part owner, or tenant in common, cannot maintain an action at law for the joint property against another co-owner. This is settled law. If the position of H. C. Rogers was merely defensive, it would be different; but he is an actor, asserting a right to recover the cotton against him who has recovered it from T. H. Rogers, who had possession of it, and as such he has no standing in a court of law.

We regret the impotence of the court in which the cause was pending to redress the wrong and enforce the right of the suitor; but after exhausting all effort to find some ground on which to maintain the right of the appellee in a court of law, are constrained by settled rules regretfully to drive him from the temple of justice, taxed with costs, not because he has not a meritorious cause, but because he mistook that particular apartment in the temple where suitors such as he should apply.

Reversed and remanded.

PARTNERSHIP — SUITS BETWEEN PARTNERS. — Before settlement, one partner cannot maintain an action at law against the other: *Cowles v. Prince*, 1 Mill Const. 416; 12 Am. Dec. 649, and note.

HOWARD v. LOUISVILLE, NEW ORLEANS, AND TEXAS RAILWAY COMPANY.

[67 MISSISSIPPI, 247.]

RAILWAYS — NEGLIGENCE. — A RAILWAY COMPANY SHOULD NOT BE ADJUDGED GUILTY OF NEGLIGENCE BECAUSE its engineer and fireman in charge of a locomotive did not keep a lookout, and on that account failed to see an animal on the track, if they were prevented from keeping such lookout by giving their attention to other duties which it was at the time incumbent on them to perform.

ACTION to recover the value of a mare killed by defendant's train. She came on the track, and ran 975 yards before she was overtaken and killed. The train was running about

twelve miles an hour, and the mare was not seen by either engineer or fireman. The former was out of his usual seat, endeavoring to fix a lubricator which was out of order, and the latter was shoveling coal into the furnace. The court instructed the jury to find in favor of the defendant, and the plaintiff appealed.

Buchanan and McKay, for the appellant.

W. P. and J. B. Harris, for the appellee.

CAMPBELL, J. The engineer and fireman were both engaged at their duties on the engine, and neither saw the animal on the track. While a lookout should be kept when running, it is not want of proper care for the servants of the company to give needed attention to their primary duty, which is the operation of the engine; and the fact that for a short time neither the engineer nor fireman was looking out for animals on the track did not make the company liable for the death of the animal killed. Upon the undisputed facts, the judgment of the law is, that the loss of the mare should fall on her owner, rather than upon the railroad company; and as there was nothing to be found by a jury, the court - rightly instructed for the defendant.

Affirmed.

RAILROADS, DUTY OF. — The first duty of a railroad company is to provide for the safety of passengers and property being carried upon its trains; its next care is for the safety of its own property; and lastly, it must exercise such a degree of care as is consistent with the prior objects, to avoid injury to trespassers. The mere fact, therefore, that an engineer did not discover an animal upon the track until the engine was near it does not necessarily show want of the proper care and diligence upon his part: *Bemis v. Connecticut etc. R. R. Co.*, 42 Vt. 375; 1 Am. Rep. 339. A railroad company owes no duty to look ahead and ascertain if animals are wrongfully upon its track: *Palmer v. Northern P. R. R. Co.*, 37 Minn. 223; 5 Am. St. Rep. 839.

LOUISVILLE, NEW ORLEANS, AND TEXAS RAILWAY COMPANY v. PETTY.

[67 MISSISSIPPI, 255.]

FELLOW-SERVANTS, WHO ARE. — All employees of a railway company engaged in the operating service connected with the business of running trains are fellow-servants. Hence a hostler or yard-servant, whose duty it is to supply locomotives before starting on the road, with water, sand, and other needful things, is a fellow-servant of a brakeman, and the latter cannot recover for injuries sustained from the failure of the former to provide the locomotive with sand or needful supplies.

MASTER AND SERVANT. — RAILWAY COMPANY FAILING THROUGH THE NEGLIGENCE OF ONE OF ITS EMPLOYEES to provide a locomotive with sand, with which to sand the track and prevent the cars from slipping, is not liable to a brakeman injured thereby, for the reason that his injury is the result of the negligence of a fellow-servant.

ACTION to recover compensation for injuries suffered by plaintiff while in the employment of the defendant as brakeman. He was caused to fall from the train through its slipping and dragging while going over a grade, and it was caused to so slip and drag by the failure of the "hostler," or some other employee of the defendant, to furnish an adequate supply of sand with which to sand the track. The trial court instructed the jury that it was the duty of the railroad company to see that its locomotives were supplied with sand, and that it could not, by delegating this duty to an employee, avoid responsibility for its neglect, and that any employee to whom such duty was delegated could not be treated as a fellow-servant of the plaintiff. Verdict and judgment for the plaintiff. Defendant appealed.

W. P. and J. B. Harris, for the appellant.

D. C. Bramlett and H. C. Capell, for the appellee.

CAMPBELL, J. The evidence tends to show that the injury received by the appellee was caused by the want of sand in sufficient quantity in the sand-box on the engine, but there is no evidence how it came about that the supply of sand was insufficient. Whether the engine was furnished properly, in this respect, at the start, and had exhausted the supply, or started unfurnished, does not appear. If the latter be true, it was because of the failure of duty of that servant of the company whose duty it was to fill the sand-box suitably; and for an injury suffered by reason of the negligence of such fellow-servant, the appellee, a brakeman on the train, has no

claim on the company, it not being made to appear that it was at fault as to the selection or retention of the servant, or in any other respect as to this service.

No rule of common law is more universally affirmed than non-liability of the master to one of his servants for an injury caused by the negligence of a fellow-servant engaged in the common service; and it was distinctly announced in this state more than sixteen years ago that all employees of a railroad company engaged in merely operative service connected with the carrying on of the business of running trains are fellow-servants, and that the common employer is not responsible to one of these for injuries caused by the negligence of another. Undoubtedly the "hostler," or yard-servant, charged with the duty of supplying the engine before starting it on the road with fuel, water, sand, or other needed thing, is a mere servant, and not the agent or representative of the master, except in that qualified and subordinate sense in which every servant may be said to be; and if it be true, which has not yet been affirmed in this state, that certain employees of a railroad company are not fellow-servants of the army of employees employed in doing the work of carrying on the business, it would yet be true that the appellee and the laborer whose default is supposed to have led to his hurt were fellow-servants, and no liability attached to the common master. The rule on this subject, announced in *New Orleans etc. R. R. Co. v. Hughes*, 49 Miss. 258, decided in 1873, and reaffirmed with emphasis in *Howd v. Mississippi C. R. R. Co.*, 50 Miss. 178 (1874), has remained undisturbed by judicial or legislative enactment, and must be regarded as the accepted doctrine in this state; and we must not be expected to follow the devious ways of those courts which, in bending the rule which all acknowledge, to effect their ideas of justice in particular cases, have well-nigh destroyed the rule itself. This rule, as held in this state, and in several other states of the United States, and in England, is a simple one, just in its principle, politic in its application, because conservative of life and property, and easily understood and applied, while all efforts to vary and qualify it have involved courts undertaking it in endless contradictions and difficulties.

The case was not tried on the principles announced in this opinion, and a new trial must be had.

Reversed and remanded.

IN THE CASE OF *Lagrone v. Mobile etc. R. R. Co.*, 67 Miss. 592, the plaintiff sought to recover compensation for an injury received by him while in the service of the defendant as a section-hand and engaged in repairing its track. He claimed that his injury was occasioned by the negligence of one Edwards, an employee of the defendant, acting as section-master. It appeared that Edwards had full control of the work and authority to hire and discharge the laborers under him, not exceeding three, and that the injury of plaintiff was received by holding a fish-bar, which the section-master was attempting to straighten. The court, following the principal case and others cited in its opinion, determined that the plaintiff and the section-master were fellow-servants, and that neither could recover for the negligence of the other, and reiterated the general principle that employees engaged in the operative department of a railway company were fellow-servants in such sense that injuries to one resulting from the negligence of the other could not impose liability upon the common master.

MASTER AND SERVANT — LIABILITY OF MASTER. — The master is not liable in damages to a servant injured through the negligence of a fellow-servant: *Galveston etc. R'y Co. v. Smith*, 76 Tex. 611; 18 Am. St. Rep. 78; note to *Adams v. Iron Cliffs Co.*, 18 Am. St. Rep. 455.

FELLOW-SERVANTS, WHO ARE: See *Galveston etc. R'y Co. v. Smith*, 76 Tex. 611; 18 Am. St. Rep. 78, and note.

SOUTHERN EXPRESS COMPANY v. BROWN.

[67 MISSISSIPPI, 200.]

MASTER IS RESPONSIBLE IN PUNITIVE DAMAGES FOR THE WILLFUL ACT OR GROSS NEGLIGENCE OF HIS SERVANT engaged in his business, whether he did or did not know the servant to be incompetent or disqualified for the service in which he was engaged.

MASTER AND UNDER-SERVANT. — THE FACT THAT THERE IS AN INTERMEDIATE PARTY IN WHOSE GENERAL EMPLOYMENT the person whose acts are in question is engaged does not prevent the principal from being held liable for the negligent conduct of his subagent or under-servant, unless the relation of such intermediate party to the subject-matter of the business in which the servant is engaged is such as to give him exclusive control of the manner and means of its accomplishment, and exclusive direction of the persons employed therefor.

MASTER AND SERVANT. — Where an express company employs a local agent who employs a driver, and furnishes a horse and supplies feed therefor, the driver may be regarded as a sub or under servant of the company, for whose gross negligence it is liable to one injured thereby.

PLEADINGS — PUNITIVE DAMAGES. — Where the amount of damages is stated, plaintiff may recover punitive damages, though they are not styled such in his complaint.

Calhoon and Green, for the appellant.

Humphries and Sykes, for the appellee.

COOPER, J. This is an action by appellee to recover damages against appellant for injuries inflicted upon him by the

servants of appellant by driving over him a loaded express-wagon. The evidence of the plaintiff tended to show that on the night when the injury was received he was walking along one of the public streets of the town of Columbus, upon a footpath on the side of the street, where pedestrians were accustomed to travel, and was overtaken and run down by the express-wagon driven by appellant's servant, which was being rapidly driven, and was without lights to enable the driver to perceive and avoid pedestrians, and that the wagon was not accustomed, in its trips to and from the depot, to go upon the footpath where plaintiff was injured. The injury inflicted was undoubtedly painful and serious, and has probably resulted in permanently impairing plaintiff's capacity to labor in his trade. On the other hand, the evidence for defendant tended to show that the wagon, while engaged in transporting the goods of the defendant, was driven by the servant of one Albright, who was the agent of defendant at Columbus, but who contracted, for a certain sum, to furnish the horse and driver, and to carry defendant's packages to and from the depot; that the wagon was being cautiously driven at a slow pace; and that the injury, if inflicted by the wagon, was either unavoidable and accidental, or was contributed to by the negligence of plaintiff. The evidence also tended to prove that the injury was not inflicted by the express-wagon, but by a carriage of another.

Among other errors assigned, is one to the action of the court in permitting the plaintiff to testify that he was a man of family, having a wife and two children dependent upon his labor for support. The record is contradictory as to what transpired in reference to this matter. The appellant reserved special exceptions during the progress of the trial, and then included them as a part of the general bill reserved to the action of the court in overruling the motion for a new trial. In the special bill the judge certifies that he overruled the defendant's objection to this evidence, but in the general bill he certifies that the objection was sustained. In this condition of the record we cannot know what action was really taken.

The court permitted the plaintiff to introduce much evidence tending to prove that Timberlake, the driver of the express-wagon, was an habitual drunkard, and habitually careless and reckless in driving. The defendant objected to the introduction of this testimony, unless the plaintiff would show that defendant had knowledge of such habits, and the court ruled

that the testimony might be given, subject to exclusion, unless knowledge should be brought home to defendant. The position of defendant was, that it was not liable for punitive damages for the gross negligence of its servant, unless it had impliedly consented thereto by continuing him in service after knowledge of his character. The plaintiff, without objection, yielded to this false assumption, and undertook the wholly unnecessary task of proving the character of the servant, and knowledge thereof by the master. It is well settled in this state that the master is responsible in punitive damages for the willful act or gross negligence of his servant engaged in his business, whether he did or did not know the servant to be incompetent or disqualified for the service in which he is engaged: *New Orleans etc. R. R. Co. v. Bailey*, 40 Miss. 395; *Vicksburg and Jackson R. R. Co. v. Patton*, 31 Miss. 156; 66 Am. Dec. 552; *New Orleans etc. R. R. Co. v. Albritton*, 38 Miss. 242; 75 Am. Dec. 98; *New Orleans etc. R. R. Co. v. Hurst*, 36 Miss. 666; 74 Am. Dec. 785.

If the plaintiff was injured by the negligence of defendant's servant, it must respond to him in damages, and cannot assign for error the unsuccessful effort of the plaintiff to prove what there was no need to prove, and which he was required to prove by an erroneous ruling secured by the defendant.

The appellant relies principally upon two points to secure a reversal of the judgment: 1. That the evidence shows the plaintiff to have been guilty of contributory negligence; and 2. That the person in charge of the express-wagon was the servant of Albright, an independent contractor, and not of defendant.

It is sufficient to say that these are both questions of fact which were fairly submitted to the jury, and their verdict on each is supported by competent and sufficient evidence.

It is true that Albright, a witness for defendant, testified that Timberlake was his servant, and not that of the defendant; but he stated the facts on which he rested this assertion, and they support the finding that Timberlake was the servant of the company. Albright was paid by the company ninety dollars per month for his services as agent; the company furnished a wagon, and Albright furnished and fed the horse, and employed the driver, for which the company allowed him forty-five dollars. The agreement was by parol, and its terms are not definitely stated, but it is not shown that the driver so employed was not the servant of the company, though selected

by Albright. He was engaged in and about the business of the company, and was, as Albright says, subject to be discharged by it. In a somewhat similar case to this the supreme court of Massachusetts said: "The fact that there is an intermediate party in whose general employment the person whose acts are in question is engaged does not prevent the principal from being held liable for the negligent conduct of his sub-agent or under-servant, unless the relation of such intermediate party to the subject-matter of the business in which the under-servant is engaged be such as to give him exclusive control of the manner and means of its accomplishment, and exclusive direction of the persons employed therefor": *Kimball v. Cushman*, 103 Mass. 194; 4 Am. Rep. 528.

The position assumed by counsel for appellant, that the plaintiff cannot recover punitive damages because not claimed in the declaration, is not maintainable. The plaintiff demanded five thousand dollars damages for the negligent act of the defendant, under which it was competent to show the character of the negligence and the extent of the injury inflicted. The jury were very fairly instructed as to the circumstances under which punitive damages could be awarded. The verdict is not excessive, and the judgment is affirmed.

Counsel for appellant suggests error in our opinion in this case, and supports his suggestion by the citation of two decisions of the supreme court of Indiana, — *Indiana etc. R'y Co v. Burdge*, 94 Ind. 46, and *Pennsylvania Co. v. Smith*, 98 Ind. 42, — and by the text of Shearman and Redfield on Negligence, in which the substance of these decisions is accepted as the law.

Shortly stated, these decisions are, that when in an action to recover damages negligence is averred, willful wrong cannot be proved; and where willful wrong is charged, negligence, however gross, cannot be proved to sustain the averment.

We fail to appreciate the applicability of these decisions to the case in court. The plaintiff here has not sought to show any willful wrong; his effort was to show gross negligence. In Indiana there seems to be a broad distinction between negligence and willfulness.

In *Terre Haute etc. R. R. Co. v. Graham*, 95 Ind. 293, 48 Am. Rep. 719, the court adopts the distinction in the language of Wharton, that "negligence is negative in its nature, and excludes the idea of willfulness." Tested by the Indiana decisions, the instruction complained of (the fifth given for the

plaintiff) is harmless, since no carelessness, however gross, could show a willful injury. But we do not construe the instruction as meaning that gross negligence may prove the intent to injure the plaintiff; its import is, that carelessness may be so gross as to show that it, the carelessness, and not the injury, was willful. That this was the sense in which the instruction was intended to be read is demonstrated by the whole case.

We find no error in our former opinion, and adhere to it.

MASTER AND SERVANT — LIABILITY OF MASTER TO UNDER-SERVANTS. — A master cannot delegate the performance of his duty to his servants so as to evade his liability: Note to *Slater Chapman*, 11 Am. St. Rep. 596; so that a master is answerable to under-servants for the negligence of superior servants or superintendents who represent him and are acting within the scope of their authority: *Galveston etc. Ry Co. v. Smith*, 76 Tex. 611; 18 Am. St. Rep. 78, and note; regardless of whether the master knows such superior servants or superintendents to be incompetent or not: *Slater v. Chapman*, 67 Mich. 523; 11 Am. St. Rep. 593, and note. But see *Powell v. Construction Co.*, 88 Tenn. 692; 17 Am. St. Rep. 925.

MASTER AND SERVANT — EXEMPLARY DAMAGES FOR WILLFUL ACTS OF SERVANT. — The question of the master's liability in exemplary damages for the willful acts of his servant is thoroughly discussed in an extended note to *Hagan v. Providence etc. R. R. Co.*, 62 Am. Dec. 377-388. Malice, evil intent, or oppression is necessary before punitive damages can be allowed: *McFee v. Railway Co.*, 42 La. Ann. 790.

DAMAGES, PUNITIVE. — Punitive damages may be recovered, though not claimed *eo nomine*, where the declaration lays damages, alleging a tort, with circumstances that may well be considered as in aggravation: *Savannah etc. Ry Co. v. Holland*, 82 Ga. 257; 14 Am. St. Rep. 158.

CHEATHAM v. STATE.

[57 MISSISSIPPI, 325.]

PRACTION — TRIAL, CHANGE OF PLACE OF. — If one of the assignments of error is, that the court erred in not changing the place of trial in a criminal prosecution, the appellate court will look not only to the evidence before the trial court when its ruling was made, but also to all the subsequent proceedings, down to the conclusion of the trial; and if it appears therefrom that the accused had a fair and impartial trial, his conviction will not be set aside.

JURY TRIAL. — If COUNSEL FOR PROSECUTION REFERS TO FACTS NOT IN EVIDENCE, and on objection being made by defendant's counsel, the trial court instructs the jury to disregard such reference, and the counsel who made it at the same time declares that he made the point inadvertently, and asks the jury to ignore it, a verdict of conviction subsequently returned in the case will not be set aside because of the improper remark of counsel for the state.

WITNESS CANNOT BE DISCREDITED BY PROVING THAT HE WAS OFFERED some bribe or other inducement, not accepted by him, to testify in the case, as that being accused, with others, of the commission of a crime, that he was promised protection and immunity from punishment if he would tell all he knew about it, and that he did not accept this offer, though at a subsequent time and at another place, and in the presence of other persons, he made a full confession of the crime, and afterwards testified in court against his accomplices, and in accordance with his confession.

TESTIMONY OF AN ACCOMPLICE. — The refusal of a trial court to instruct or advise a jury to act with great prudence and suspicion upon the evidence of an accomplice, and to acquit unless it is corroborated in material particulars, will not justify the appellate court in setting aside a verdict and judgment of conviction. Whether such instruction should be given or not rests in the discretion of the trial judge, and his refusal to give it is not assignable as error.

JURY TRIAL. — On the trial of one accused of murder, it is not error entitling him to a new trial for the court to instruct the jury that they may consider threats against the decedent, and proved to have been made by the accused, and any motive to kill established by the evidence, together with all the evidence in the case.

William C. McLean, for the appellant.

T. M. Miller, attorney-general, for the state.

COOPER, J. Appellant has been convicted of the murder of one Tillman, and sentenced to capital punishment. We dispose of the errors assigned, in their order.

The first assignment of error is upon the action of the court in refusing a change of venue, and upon this it is sufficient to say that no abuse of judicial discretion appears to have been committed. Upon the motion for the change of venue, a number of witnesses were examined, the majority testifying that in their opinion a fair and impartial trial could not be secured in the county. But a number of them declared that no reason existed, known to them, why an impartial jury might not be secured. Looking to the whole evidence upon this question, it seems to us that many of the witnesses believed a jury could not be secured from that section of the county in which the homicide occurred, and not knowing the public sentiment in other portions of the county, assumed it to be hostile to the defendant, as it was in the section in which they were acquainted. But the question of error or no error in this respect is not determinable alone from the stand-point occupied by the court in passing upon the question before the trial was commenced. On the motion for a new trial, the court had before it the whole case as developed, including

the examination of the jurors on their *voir dire*, the selection of the panel, the temper and conduct of the jurors and witnesses, and the evidence of the existence or non-existence of that pervading public sentiment known as undue prejudice in the public mind, which, existing, entitles one accused of crime to a trial in another county. The record discloses that a *venire* of fifty names was drawn at the instance of the prisoner, and by the bill of exceptions it is certified that "a jury, twelve lawful men, to wit, Charles Trimble and eleven others, taken from the special *venire*, the defendant not having exhausted his peremptory challenges," was selected.

The witnesses summoned in defendant's behalf seem to have promptly responded to the processes of the court, and, so far as we can discover, testified fully, freely, and without any sort of hesitancy or reserve, in his favor. One witness for the state, having testified to a conversation he claimed to have overheard between the defendant and one of his co-defendants, in effect confessing his guilt, was promptly contradicted by the testimony of the only other man who, he stated, was present and within hearing. A great number of witnesses, apparently taken from the body of the community in which the homicide occurred, freely attacked the general credibility of the most important witnesses for the state. However honestly the witnesses on the preliminary motion for change of venue may have felt that the accused could not secure an impartial trial in the county of the offense, the trial, as surveyed from its conclusion, instead of its commencement, impresses us, as it did the court below, as being entirely free from any bias against appellant.

The next assignment of error is upon certain remarks made by counsel aiding the district attorney, in the course of his argument to the jury. One of the witnesses for the state stated, in reply to a question from the defendant's counsel, that some time after the arrest of appellant he (witness) told him (appellant) that Lamons (a defendant jointly indicted with appellant) was gone, and was not at home. It appears that when appellant was informed that suspicion rested upon Lamons, he replied that Lamons could not have committed the murder, for he had slept with appellant the night of the murder. After this, and when appellant was arrested, he stated that he had spent the night of the murder with his mistress (a Miss Robinson). In his argument, the counsel for the state, in speaking of these contradictory declarations by

defendant as to where he had spent the night, said: "The reason why defendant changed his tactics was because he had intellect enough to know that the flight of Lamons was a circumstance of guilt and evidence of it, and that neither Cheatham nor Lamons could explain it." Instantly upon this remark being made to the jury, counsel for appellant objected to it, because there was no evidence of the flight of Lamons, and that such evidence, if offered, would be incompetent as against the appellant. Whereupon the court instructed the jury that it should disregard so much of the argument of counsel as had reference to the flight of Lamons, and counsel for the state also stated to the jury that he had inadvertently made the point, that he withdrew his remarks, and would ask the jury to ignore them. It is now strenuously urged that for this inadvertence of counsel, instantly corrected by both court and counsel, the verdict must be set aside, and a new trial awarded. It was impossible, says counsel, for the court or the state's attorney to expunge from the mind of the jury the effect of the suggestion; that the jury could not forget the fact suggested, and would not ignore its existence in forming its verdict. The standard sought to be erected by counsel, by which to test the "fair and impartial trial" to which one accused of crime is entitled, is too perfect and refined. It excludes not only appreciable error, but invades the field of metaphysics, and invites investigation of subjects with which neither courts nor juries are competent to deal. Courts must consider juries as bodies of plain men imbued with an honest desire to perform with fidelity the duty imposed on them of discovering the truth from the evidence submitted to them, in conformity with the instructions as to the law given them by the court. Until the contrary is made to appear, it must be presumed that a jury performs its duty, and ignores incompetent testimony to which its attention is called by the court. We do not think the argument of the state's attorney subject to the criticism of counsel that it was an indirect and covert remark upon the failure of the defendant to testify as a witness.

The next assignment of error is upon the action of the court in rejecting certain testimony offered by defendant. The principal evidence for the state, connecting appellant with the murder of Tillman, was the testimony of two of his accomplices, Lee Irvin and Cornelius Robinson. By them his guilt was thoroughly established, if their testimony was credited by the jury.

It appears that soon after the murder of Tillman, suspicion became fixed upon Irvin and Robinson, and on Saturday or Sunday morning (the homicide having occurred on Thursday) they were arrested. On Sunday morning the body of Tillman was discovered in a stream, where it had been sunk by the murderers by attaching large rocks to its head and feet. After the discovery of the body, violence was used against them to extort a confession against others, and assurances were given Irvin, at least, that he should be protected if he would divulge all he knew of the crime. On cross-examination of Irvin, these facts were elicited, but it appears that neither he nor Robinson made any statements relative to the crime until after they had been removed to the jail at Oxford, Mississippi; the other defendants were in the mean time incarcerated in the jail of Grenada County. After Irvin and Robinson had testified, C. H. Perry was being examined as a witness, when the defendant's counsel asked him: "What, if any, inducements were offered and extended to Lee Irvin and Cornelius Robinson in order to get them to testify in the case?" And further, counsel for defendant offered to prove by Perry, and also by members of the coroner's jury which was investigating the death of James Tillman, that members of the coroner's jury, and other prominent citizens,—men of means and influence,—said to Lee and Cornelius: "We have the dead thing on you; it will be better for you to tell the truth about the matter, and if you will tell the truth, all you know about it, you shall not be hurt, but we will protect you, and will furnish money for you to leave the country when the trial is over." Upon objection by the state, this evidence was excluded, and the defendant excepted. We agree with counsel for appellant that it is not always necessary to lay the foundation for evidence attacking the credibility of witnesses, by first inquiring of the witness sought to be attacked whether the discrediting fact exists. It will, however, we think, be found that in all cases in which, without preliminary inquiry from the witness, it is competent to discredit him by evidence of other facts, the other fact itself must, of and by itself, be of a nature to throw discredit upon his testimony. Thus one may prove that an adversary witness is of bad reputation for truth and veracity, or that he is unfriendly to the party against whom he testifies, or is nearly related to his adversary, or has been convicted of crime, or has accepted a bribe to testify. But the fact that some third person has offered a bribe or

other inducement, not accepted by the witness, does not tend to discredit him. If such were the rule, the most spotless and disinterested witness would be at the mercy of the unscrupulous, without power or opportunity to defend himself from unjust aspersions.

The course of inquiry proposed by counsel for accused was not for the purpose of establishing suspicious circumstances the existence of which the state's witnesses had denied. Irvin had detailed what had transpired; had admitted the threats and force used against him; the promises of immunity that had been given on condition of his divulging all he knew of the killing. All of these things had proved unavailing to procure any statement from him, and it was not until after he and Robinson had been carried to another county that either made any confession or statement. Robinson had not been interrogated by the defendant touching these matters. It was not proposed to prove that either of the witnesses had, at the time of the inducements offered, accepted the same, and testified, or promised so to do. The sole purpose was to discredit the witnesses by evidence of proposed, but unaccepted, inducements, as to which the witness Irvin had been examined, and had freely spoken, and as to which Robinson had not been interrogated. Under these circumstances, the evidence was properly excluded.

The next exception taken was to the action of the court in refusing the twenty-third instruction asked by the accused, and by withdrawing another instruction, which the court had given, touching the duty of the jury to acquit if there was no corroboration of the testimony of the accomplices. The refused instructions pertain to the same subject, and will be considered together.

By the twenty-third instruction the defendant asked the court to tell the jury that "the act of an accomplice in testifying for the state so as to criminate himself with others is voluntary. He could not be compelled so to do. He testifies for the state under a promise of favor, expressed or implied, on condition that he will make a full confession and statement in regard to the matter. His testimony comes in such questionable shape that it should, in the interest of truth and justice, be subjected to the severest scrutiny, and acted on with the greatest caution." By another instruction, the court had been requested to advise the jury not to convict upon the uncorroborated evidence of accomplices. In acting on this

instruction, the court struck out the word "advise" and inserted in lieu thereof the word "instruct." After counsel for the defendant had concluded his argument, the state's attorney moved the court to withdraw this instruction, which was done. Counsel for defendant then asked the court to give it with the word "advise" instead of the word "instruct," which the court refused to do. By the fifth and ninth instructions given for defendant, the court had told the jury that it was its province to determine what weight should be given to the testimony of the accomplices, and that it should consider "all the circumstances in evidence which may tend to disprove the truth of the testimony, or to throw suspicion upon it, or to cause its rejection, and also to consider all the circumstances which may explain the motive of the accomplice in testifying falsely, or what might tend to prompt colored or untrue statements from him, and it will be proper for the jury to consider such testimony in connection with any threats made against the accomplice prior to his testifying, or any violence threatened or attempted upon or towards him, or any promises of help or aid or relief made to him, or any intimidation offered against him, or any raising of hopes in any way in his breast, of escape for himself, or any knowledge or apprehension on the part of the accomplice of great feeling or prejudice against the defendant, or any other fact or circumstance naturally calculated to influence the fears or feelings of the accomplice; provided such circumstances, or any of them, appear in evidence, and the jury may, in view of any such circumstances, discredit the testimony of said accomplice and wholly reject it, even if such rejection will lead to the acquittal of the defendant."

The suspicion with which the testimony of accomplices is received by the courts, and their unwillingness to sustain convictions resting wholly upon the uncorroborated evidence of such persons, has led to the very general practice of advising juries to act with great prudence and suspicion upon such evidence, and to acquit unless there is corroboration in material particulars. But our researches have failed to discover a case in which a conviction has been set aside by reason of the court refusing so to instruct or to advise. In the case of *State v. Jones*, 64 Mo. 391, an instruction substantially that of the twenty-third here was refused by the court, and the supreme court, in passing upon the case declared that the instruction "should have been given"; but the judgment was reversed on other grounds, and we do not know that in the

absence of other error the refusal of this instruction would have been held reversible error.

In *State v. Haney*, 2 Dev. & B. 390, the supreme court of North Carolina declared what we understand to be the true rule upon the subject. The practice of giving such instructions or advice to the jury, it is there said, rests in the discretion of the presiding judge, and his refusal so to do is not assignable as error. "No one," said the court, "can require of the judge to give an instruction to the jury, except on the law of the case." "The judge may caution them against reposing hasty confidence in the testimony of an accomplice. It is usual, justifiable, and, we add, it is proper to do so, where he has cause to apprehend that the jury may feel themselves bound to find a verdict conforming to the positive testimony of the witness without weighing the circumstance of suspicion and distrust under which his testimony is rendered. Long usage, sanctioned by deliberate judicial approbation, has given to this ordinary caution a precision which makes it approach to a rule of law. Jurors are advised that it is deemed hard, and that it is unsafe to convict on the testimony of an accomplice, unless that testimony receive material support from evidence *aliunde*, so coinciding with it in considerable circumstances as to leave no rational doubt in their minds of its truth. In what parts of the details of the testimony this confirmation should be had, in order to remove the jealousy and suspicion to which the testimony is exposed, and to create such degree of confidence in his general credibility as to command faith in those parts of his narrative where he is not supported, the judge has not the right to advise or direct the jury. Speculative writers have indeed undertaken, with much ingenuity, to devise rules of faith on the subject, but the law is wholly silent concerning them. Tolerating and approving of the general custom, it trusts the application of the caution, under all the circumstances testified, wholly to the intelligence and integrity of the jury."

The learned annotator of the case of *Commonwealth v. Price*, 71 Am. Dec. 668, adopts the declaration made in this case, that "long usage, sanctioned by deliberate judicial approbation, has given to this ordinary caution a precision which makes it approach to a rule of law. It is questionable, however, if in any case its omission would be ground for a new trial"; and in its support cites many cases which will be found in the note to that case.

The remaining assignment of error is upon the giving of an instruction by which the court told the jury it might consider any threats against the deceased, proved to have been made by the accused, and any motive to kill established by the evidence, together with all the evidence in the case, in making up its verdict.

The instruction is not subject to the criticism that it is upon the weight of the evidence, for it does not tell the jury that such facts prove or tend to prove the issue in favor of the state. Nor does it announce any erroneous proposition of law. On the contrary, by admitting such evidence, the court declared its competency, and it is true that the jury may and should consider all the evidence in forming its verdict. While we do not think the instruction erroneous in the sense of entitling the accused to a new trial, it is much to be hoped that the courts will reject such charges when asked. Counsel representing the state may very properly argue before the jury the effect of such evidence. But the field of argument is so nearly invaded by such instructions, that the court may with propriety decline to give them.

We find no error for which the judgment should be reversed, and it is affirmed.

JURY TRIAL — IMPROPER REMARKS BY COUNSEL. — As to when the misconduct of counsel in arguments to the jury is so seriously improper as to call for a reversal of a judgment, see extended note to *McDonald v. People*, 9 Am. St. Rep. 559-570; *Bullard v. Boston & M. R. R. Co.*, 64 N. H. 27; 10 Am. St. Rep. 367, and note 376, 377; *People v. Atkin*, 66 Mich. 460; 11 Am. St. Rep. 512, and note; *Kern v. Bridwell*, 119 Ind. 226; 12 Am. St. Rep. 409, and note. In *Lamar v. State*, 65 Miss. 93, the court refused to reverse a judgment of conviction, although the prisoner's rights were infringed by the trial court in allowing the district attorney, over the prisoner's objection, to make improper remarks to the jury, it appearing from the defendant's own evidence that he was guilty of the crime charged.

ACCOMPLICES — WITNESSES. — As to the corroboration of an accomplice's testimony, see *Commonwealth v. Holmes*, 127 Mass. 424; 34 Am. Rep. 391, and note 408-411; note to *State v. Lyon*, 31 Am. Rep. 522-526.

CRIMINAL LAW — HOMICIDE — THREATS. — Threats made by an accused against the deceased are admissible against the former, to show his malice: *Hopkins v. Commonwealth*, 50 Pa. St. 9; 88 Am. Dec. 518, and note; *Beine v. State*, 88 Ala. 91; *Babcock v. People*, 13 Col. 515.

ELTRINGHAM v. EARHART.

[57 MISSISSIPPI, 488.]

DAMAGES. — THE PECUNIARY CONDITION OF BOTH THE PLAINTIFF AND DEFENDANT may be taken into consideration by the jury in estimating the damages which should be awarded the former for an assault committed on him by the latter, and an instruction to the jury to that effect is not erroneous.

J. M. Gibson and J. G. Leech, for the appellant.

Claude Pintard, for the appellee.

COOPER, J. This is an action by appellee to recover damages for injuries inflicted by appellant by an assault and battery. From a verdict and judgment for two hundred dollars the defendant appeals. The principal error assigned is the action of the court in giving the sixth instruction asked by plaintiff, which is as follows: "The court instructs the jury that if they find for plaintiff they have the right to take into consideration, in estimating the damages, the pecuniary condition of both the plaintiff and defendant."

It is said by counsel for appellant that there is neither principle nor authority for instructing a jury in cases of this character to take into consideration the poverty of the plaintiff.

We find no difficulty in supporting the charge upon both principle and authority. The evidence shows that the plaintiff was a poor man, dependent upon his personal labor for his support, and that by reason of the injuries inflicted upon him he was for more than two weeks unable to properly perform his duties, and yet feels the effect of the blows and kicks administered by the defendant.

In actions of this character, in which insult and mortification bear so large proportion to the injury inflicted, juries are not restricted to the actual pecuniary damages sustained. Treating of such actions, Greenleaf says: "Nor are the jury confined to the mere corporal injury which the plaintiff has sustained; but they are at liberty to consider the malice of the defendant, the insulting character of his conduct, the rank in life of the several parties, and all the circumstances of the outrage, and thereupon to award such exemplary damages as the circumstances may, in their judgment, require."

In *McNamara v. King*, 2 Gilm. 432, the trial court had permitted evidence of the pecuniary condition of both plaintiff and defendant, and this was assigned for error. The court said: "We are of opinion that the circuit court decided cor-

rectly in admitting the evidence and giving the instructions. In actions of this kind, the condition in life and circumstances of the parties are peculiarly the proper subjects for the consideration of the jury in estimating damages; their pecuniary condition may be inquired into. It may be readily supposed that the consequences of a severe personal injury would be more disastrous to a person destitute of pecuniary resources, and dependent wholly on his manual exertions for the support of himself and family than to an individual differently situated in life. The effect of the injury might be to deprive him and his family of the comforts and necessities of life. It is proper that the jury should be influenced by the pecuniary resources of the defendant. The more affluent, the more able he is to remunerate the party he has wantonly injured."

In *Gaither v. Blowers*, 11 Md. 536, this decision was approved as "good sense," and as such we add our concurrence in it.

We find no error in the proceedings. The appellant may congratulate himself upon escaping with so moderate a verdict. A very much larger one would have been supported by the evidence, and would have met our hearty approval.

Affirmed.

DAMAGES — PECUNIARY CONDITION OF PARTIES. — Pecuniary circumstances of the parties, as affecting the measure of damages in actions of assault and battery, see note to *Rowe v. Moss*, 87 Am. Dec. 564, 567.

WEISINGER v. COOK.

[87 MISSISSIPPI, 511.]

DEED IS INOPERATIVE FOR WANT OF DELIVERY, if after being signed and acknowledged by the grantor, he leaves it in the custody of an agent, with instructions to deliver it to the grantee only in the event of the grantor's death, though, after such death, it is delivered to the grantee by the agent, as directed.

Powel and Powel, for the appellant.

Perkins and Percy, for the appellees.

COOPER, J. Complainant exhibited her bill in this cause against the heirs at law of J. W. Stone, to cancel as a cloud upon her title a certain deed under which the defendants claim title to the lands described therein. She states that her husband, J. E. Stone, was the owner of said lands, and

died leaving no children, whereupon said lands descended to her as his sole heir at law. The facts in reference to the execution of the deed sought to be canceled, as stated in the bill, are, that in October, 1882, the said J. E. Stone prepared, or had prepared, a deed conveying said lands to his father, J. W. Stone, which deed he put among his private papers in the safe, of which, as clerk of the chancery court of Tunica County, he had control, where it remained until some time thereafter, when the said J. E. Stone and complainant were about to start on a visit to the state of Florida, because of the ill-health of her said husband. At that time J. E. Stone sent to his office for the deed, and acknowledged its execution before a proper officer; and this being done, he handed the deed to one Jacques, his deputy, who had charge of all his papers, and directed him to put it back in the same place where it had been kept from the day he had signed the same, never intending to part with the control or possession of said deed while he lived, and not to deliver or record the same unless he, the said J. E. Stone, never returned,—meaning, unless he died.

The complainant, by her bill, avers "that there was no delivery of said deed by said J. E. Stone to the said J. W. Stone, or to any one for him. The intention of J. E. Stone was, that if he died before he returned home from Florida, the said Jacques was to deliver said deed to said J. W. Stone. If he did not die, then the said J. E. Stone was to have control of the same." The appellees demurred to the bill, on the ground that the facts stated show delivery of the deed. The demurrer was sustained, and the complainant appeals.

The demurrer should have been overruled. No delivery of the deed is shown. On the facts stated, the deed was never out of the custody of the grantor. It was handed to Jacques, to be by him deposited among the private papers of the grantor, there to remain until his death, or until he should exercise his will over it by dealing with it according to his pleasure. The facts disclose no act or purpose of a present delivery, absolute or conditional. They are entirely consistent with the control of the deed by the grantor during his life, and inconsistent with his parting with any power over it. Mr. Stone evidently thought that he might dispose of his estate by deed, executed according to the forms of law, of which he remained in possession and control, and which was to be operative only upon his death. In this he was mis-

taken: *Cook v. Brown*, 34 N. H. 460; *Brown v. Brown*, 66 Me. 316; *Prutsman v. Baker*, 30 Wis. 644; 11 Am. Rep. 592.

The decree is reversed, demurrer overruled, and defendants allowed thirty days in which to answer after the mandate shall have been filed in the court below.

DEEDS — SUFFICIENCY OF DELIVERY. — Where the grantor in a deed of gift gave it to one of the subscribing witnesses, with instructions to have it recorded, and to hold it as his agent until he should be dead, and then deliver it to the donees, which instructions were followed, it was decided that it could not take effect as his present deed, nor as an escrow, but if valid at all, it must be as a testamentary paper, and be proved accordingly: *Wellborn v. Weaver*, 17 Ga. 267; 63 Am. Dec. 235, and particularly note 243-246; and see also *Jones v. Jones*, 6 Conn. 111; 16 Am. Dec. 35, and note 43-45.

RICHARDS v. VACCARO & Co.

[67 MISSISSIPPI, 516.]

FRAUDULENT CONVEYANCES — BURDEN OF PROOF. — If a transaction is shown to have been made with a fraudulent purpose on the part of the grantor, this makes a *prima facie* case in favor of those who are entitled to attack such deed or transfer, which must be met by counter-proof on the part of the grantee, or those claiming under him, tending to show that the grantee was a purchaser for value, and without notice of the grantor's fraud.

FRAUD, PRESUMPTION REGARDING. — While fraud is never to be presumed, yet if a transaction is shown to be fraudulent on the part of one of the actors, then it is not incumbent on the party attacking the transaction to prove the fraud of the other actor claiming under it.

Smith and Powell, and Downs and Ward, for the appellant.

F. B. Pratt, and Calhoon and Green, for the appellees.

COOPER, J. Vaccaro & Co. sued out an attachment against one Ward, which was levied on certain goods which the plaintiffs claimed had been sold by Ward to Richards for the purpose of defrauding his creditors. Plaintiffs sustained their suit against Ward, and the present controversy is between them and Richards, who interposed a claim to the property seized. On the trial of the claimant's issue, Ward's fraudulent purpose in making the sale was abundantly shown. The claimant contended that it devolved on the plaintiffs to establish not only the fraud of Ward, but that he (the claimant) was not a *bona fide* purchaser for value, but participated in, or had knowledge of, Ward's fraudulent design. The court rejected this view, and instructed the jury that "if it believed,

from the evidence, that the sale by Ward was fraudulent on his part, then the burden of proof is on Richards to show to your satisfaction that he purchased the goods for value, and without knowledge of Ward's design." The giving of this instruction is the principal error assigned.

There is conflict in the decisions and much confusion among the text-writers on the question involved. The effect of the statute against fraudulent conveyances, as held by one line of decisions, is about this: Conveyances made by a grantor in fraud of his creditors are valid, unless it be shown that the purchaser is not a purchaser for value and in good faith. Another line of authorities states the effect of the statute to be, that conveyances fraudulent on the part of the grantor are invalid at the suit of his creditors, unless it be shown that the purchaser is a purchaser for value and in good faith. The authorities are uniform in declaring that one who attacks a conveyance as fraudulently made must establish the fraud. The burden of proof is upon him; and he is opposed by the presumption of good faith and legality that attaches in favor of the ordinary transactions of business. The conflict of decisions arises a step beyond, when the inquiry is, whether the plaintiff, by proof of the fraud of the grantor, has made a *prima facie* case against the grantee, entitling him to recover, in the absence of any evidence by his adversary. In Massachusetts, New Jersey, Iowa, Wisconsin, Connecticut, and Maryland, it is held that the plaintiff must not only show fraud on the part of the seller, but participation in or notice of it by the buyer: *Bridge v. Eggleston*, 14 Mass. 245; 7 Am. Dec. 209; *Foster v. Hall*, 12 Pick. 89; 22 Am. Dec. 400; *New York F. Ins. Co. v. Tooker*, 35 N. J. Eq. 408; *Tantum v. Green*, 21 N. J. Eq. 364; *Merchants' Nat. Bank v. Northrup*, 22 N. J. Eq. 58; *Adams v. Foley*, 4 Iowa, 44; *Fisfeld v. Gaston*, 12 Iowa, 218; *Mehlhop v. Pettibone*, 54 Wis. 652; *Partelo v. Harris*, 26 Conn. 480; *Cooke v. Cooke*, 43 Md. 524. On the other hand, the courts of Pennsylvania, New York, Alabama, Texas, Arkansas, and North Carolina hold that where the fraud of the grantor is established, a *prima facie* case is made by the plaintiff, which must be met by the purchaser by evidence that he is a purchaser in good faith, for value: *Rogers v. Hall*, 4 Watts, 359; *Clark v. Depew*, 25 Pa. St. 509; 64 Am. Dec. 717; *Lloyd v. Lynch*, 28 Pa. St. 419; 70 Am. Dec. 187; *Starin v. Kelly*, 88 N. Y. 418; *Hamilton v. Blackwell*, 60 Ala. 545; *Gordon v. Tweedy*, 71 Ala. 202;

Brown v. Texas C. Hedge Co., 64 Tex. 396; *Miller v. Fraley*, 21 Ark. 22; *Fullenwider v. Roberts*, 4 Dev. & B. 278; *Worthy v. Caddell*, 76 N. C. 82.

We concur in the views announced by those courts which hold that proof of fraud on the part of the grantor is sufficient to entitle his creditors to subject the property fraudulently assigned, in the absence of evidence showing the claimant to be a purchaser for value and in good faith. We fail to perceive why, in cases of this character, the party assailing the conveyance shall be required to assume the burden of showing participation in the fraud by the purchaser, and the non-payment of value for the property fraudulently conveyed.

The decisions holding it to be the duty of the creditor to establish not only the fraud of the seller, but that of the purchaser, seem to rest upon an undue extension of the rule that fraud is never to be presumed, but must always be proved by the party alleging it to exist. This rule is so well established as to have become one of the maxims of the law; but it is not true that where a transaction has been shown to be fraudulent on the part of one of the actors, it is incumbent upon a party claiming or defending against it to show the fraud of the other actor claiming under it. Good faith and legality are presumed to exist in reference to the ordinary business transactions of life, and the burden is upon him who asserts the contrary; but it is otherwise when the transaction is itself unfair, or is *prima facie* shown to be illegal: Wharton on Evidence, secs. 366, 1248; Bigelow on Fraud, 130, 132. Mr. Bigelow, while denying that the defense of purchase for value is new matter in avoidance, concedes that the plaintiff proving the fraud of the seller makes a *prima facie* case. He says: "A scrutiny, however, of the situation, in such a case, will show that the defense of purchase for value is not new matter in avoidance. The defendant, being a purchaser from one having the legal title, . . . has himself acquired that title. The plaintiff can then only have an equitable title, and to prevail, he must overcome the former; and this whether he sues at law or in equity. In other words, he must show that the purchaser's title is bad. This he undertakes to do by showing that the vendor's title was obtained from him [the plaintiff] by the vendor's fraud; and this is sufficient. But how does it become so? The answer is, that in law it shows presumptive notice to the defendant. The defendant is presumed,

prima facie, to be privy to his grantor's fraud. This presumption the defendant must now meet, but just as he would meet any other fact alleged and testified to, or presumptively shown, by the plaintiff. The defense is still negative, i. e., denial. Hence the burden of proof is still upon the plaintiff. . . . But it may still be thought necessary to inquire whether the plaintiff himself has really sustained the burden of proof, so as to require the defendant to come to the support of his defense by merely showing fraud. It may be asked if the plaintiff ought not to go further, and though he has made a case of fraud in the grantor, offer some definite evidence of notice, or what, for the present purpose, is the same thing, that the conveyance to the defendant was voluntary. The answer of the authorities, though not without here and there a discordant note, is, that evidence of the fraud is enough, and this whether the case be one of fraud on creditors or fraud on a vendor. Such is the better answer in those states in which, in cases of fraud upon creditors, notice to the purchaser is sufficient to defeat his title."

There are two classes of suits at law so nearly analogous to suits by creditors to subject property fraudulently conveyed, that it is difficult to draw a distinction between them sufficient to warrant the application of different rules of procedure. These are suits by one whose property has been secured by the fraud of the vendee, and who sues to recover it from another claiming under the fraudulent vendee, and suits by an indorsee of a bill or note against the maker, who defends upon the ground that the instrument was secured by the fraud of the payee. In these cases it has been uniformly held that proof of the fraud of the vendee of the property, or payee of the note, imposes upon the party claiming under him the duty of showing that he is a purchaser for value and in good faith: *Bailey v. Bidwell*, 13 Mees. & W. 73; *Fitch v. Jones*, 32 Eng. L. & Eq. 134; *Paton v. Coit*, 5 Mich. 505; 72 Am. Dec. 58; *Clark v. Pease*, 41 N. H. 414; Bigelow on Fraud, 132; *Spira v. Hornthall*, 77 Ala. 137; *Easter v. Allen*, 8 Allen, 7; *Morgan v. Morse*, 13 Gray, 150; *Haskins v. Warren*, 115 Mass. 514. Proof that the purchaser bought for value, the price paid being adequate, is generally held, in the absence of other evidence showing notice of the fraud, to raise the presumption of good faith: *Starin v. Kelly*, 88 N. Y. 418; *Shores v. Doherty*, 65 Wis 153; *Spira v. Hornthall*, 77 Ala. 137.

In view of the very full instructions secured by the claim-

ant in this case, we deem it unnecessary to consider whether the first instruction for the plaintiffs is technically accurate, in announcing the proposition that proof of the fraud of the seller shifted the burden of proof to the claimant, or whether, as contended by Mr. Bigelow, the instruction should have been that such proof made a *prima facie* case for the plaintiffs, which it was incumbent upon the claimant to meet by the production of evidence sufficient to restore the equilibrium. The distinction is technical, and it is manifest that in this case it was not influential in producing the result reached.

This disposes of the errors assigned, except the action of the court in refusing the second instruction asked by the claimant. The substance of this instruction is but a repetition of the matters distinctly specified in the other instruction given for the claimant, and under such circumstances its refusal cannot be ground of error.

The judgment is affirmed.

FRAUDULENT CONVEYANCES — BURDEN OF PROOF. — The burden of proof is upon the grantee in a deed executed to him by an insolvent debtor, in payment of an existing debt, to show that the consideration paid for the conveyance was both valuable and adequate, when another creditor who has reduced his debt to judgment attacks the conveyance for fraud: *Mobile Sav. Bank v. McDonnell*, 89 Ala. 434; 18 Am. St. Rep. 137, and note.

PHENIX INSURANCE COMPANY v. BOWDRE.

[67 MISSISSIPPI, 620.]

INSURANCE — PAROL WAIVER. — NOTWITHSTANDING A CONDITION IN THE POLICY OF INSURANCE that "it is understood and agreed that the agents of this company have no authority in any manner, or by any act or omission whatever, either before or after making this contract, to waive, alter, modify, strike from this policy, or otherwise to change any of its conditions or restrictions, except by distinct, specific agreement, clearly expressed and indorsed hereupon, and signed by the agent making it," a parol waiver by an agent, of defects in proof of loss, is effectual.

INSURANCE — GENERAL AGENT, WHO IS. — One who is appointed by an insurance company in one state as its agent for the transaction of the business of insurance in another state during a designated year, and who is authorized to make contracts of insurance and to issue policies, is a general agent; and his principal is bound by a notice to him, or by anything said or done by him in relation to the contract or risk, either before or after the contract is made.

INSURANCE — CONDITION AVOIDING POLICY IF INTEREST OF THE INSURED BE OTHER THAN AN ABSOLUTE FREE-SIMPLE means only that he shall

not have a limited interest, but shall claim and hold under a conveyance purporting to invest him with an estate in fee; but an applicant for insurance is not called upon to settle questions of title with very great precision, and the fact that there is a naked legal title outstanding will not avoid the policy if the assured is the entire beneficial owner of the premises.

ACTION of W. B. and T. B. Bowdre against the Phenix Insurance Company, of Brooklyn, New York, to recover for the loss of plaintiffs' residence by fire. The policy which had been issued to the plaintiffs contained two conditions which were relied upon by the defense, the first of which was as follows: "And as a part of the preliminary proofs of loss, the assured shall procure the duly verified certificate of some reliable and responsible builder, in detail, as to the actual cash value of such building, made before said fire, which shall be attached to and form a part of such proofs." The other condition was as follows: "It is understood and agreed that the agents of this company have no authority in any manner, or by any act or omission whatsoever, either before or after making this contract, to waive, alter, modify, strike from this policy, or otherwise to change any of its conditions or restrictions, except by distinct, specific agreement, clearly expressed and indorsed hereupon, and signed by the agent making it. Nor shall silence upon receipt of notice of breach of any condition or restrictions herein, or failure to declare this policy forfeited thereby, or the issuance of any renewal or new policy, or the acceptance of any premium or other money, or any other act or omission whatsoever by any agent of this company, whether with or without knowledge of such breach, or whether before or after the making of this contract, work any waiver of such conditions or restrictions, or affect any estoppel against this company, or deprive it of any forfeiture or defense, either in law or in equity, to an action upon this policy." The policy was countersigned and issued by T. P. Hill, agent of the insurance company at Senatobia, Mississippi. He was provided with blank printed policies signed by the president and secretary of the insurance company, and it was his custom to make contracts of insurance, and fix the rate, receive the premium, and issue policies, first filling in the written portions. He transmitted to the company daily a report of his business. His certificate or commission showed his appointment as agent, "with full power to receive proposals for insurance against loss and damage by fire in Senato-

bia, Mississippi, and vicinity, to fix rates of premium, to receive moneys, and to countersign, issue, renew, and consent to the transfer of policies of insurance signed by the president and secretary, to the said Phenix Insurance Company, subject to the rules and regulations of said company, and to such instructions as may from time to time be given by its officers." The certified transcript from the auditor's office showed that T. P. Hill was in the list of agents appointed in the state by the insurance company, and that the certificate of his appointment, signed by the president and secretary, was as follows: "This is to certify that the persons named in this schedule have been duly appointed by the Phenix Insurance Company, of Brooklyn, New York, as its agents for the transaction of the business of insurance in the state of Mississippi during the year 1888." Soon after the plaintiffs' house was burned, they applied to the agent, Hill, and asked him what should be done to collect the money. He answered that notice of the loss must be given to him, and thereupon wrote out said notice, addressed to himself; it was then signed by one of the plaintiffs and taken by Hill, who further informed plaintiffs that they must make proof of loss, and copied for them a form of proof which plaintiffs recopied and returned to the agent duly signed. The agent suggested some corrections, which were made, after which he received the proof, declared it correct, and forwarded it to the company. The proof so forwarded did not contain any builder's estimate, as required by the policy, the agent having declared to plaintiff that he did not think it necessary, unless the company should ask for it. The proofs, so prepared and delivered to the agent, were by him, on or about the 22d of September, 1888, forwarded to the general agent of the company at Chicago. On the 28th of September the general agent sent a registered letter to the plaintiffs at Senatobia, calling attention to the omission of the builder's estimate from the proofs of loss, and declaring that this estimate was indispensable, and that the general agent would not receive the proof of loss without it. The plaintiffs had, however, changed their post-office address from Senatobia to Coldwater, of which fact the general agent of the company had no notice, and this letter, on that account, failed to reach the plaintiffs until about the expiration of the time for furnishing proof of the loss. On September 29th, plaintiffs wrote the company again, sending a copy of the proof of loss, made under the direction and

corrected by the agent, and in the letter stated that a written statement of the fire had been given to the agent, Hill. This latter letter, though received at Chicago on the 4th of October, was never answered. On receiving the letter from the general agent at Chicago, the plaintiffs again consulted the agent, Hill, at Senatobia, who still thought that the builder's estimate was unnecessary. One was, however, obtained by the plaintiff and sent to the general agent on the 23d of October. It was received on the 30th of the same month, and the general agent, in acknowledging its receipt, declared that the time had expired and that the policy had been forfeited. The title to the property insured had been purchased by the executors of plaintiffs' grandfather, who had taken title in themselves for the benefit of the plaintiffs and their brothers and sisters. In doing so, these executors were acting under a devise in the will, and the property so purchased, or the proceeds, was, by the terms of the will, to be divided between the plaintiffs and their brothers and sisters when the youngest arrived at age. The plaintiffs had succeeded to the title of all their brothers and sisters. Verdict and judgment for the plaintiff; defendant appealed.

Shands and Johnson, and W. R. Harper, for the appellant.

Oglesby and Taylor, for the appellees.

WOODS, C. J. The various defenses presented by the defendant corporation in the court below, on the grounds of overvaluation of the property destroyed, the vacant and unoccupied condition of the house when burned, the occurrence of the fire through the negligence of the plaintiffs, and the institution of plaintiffs' suit before resort was had to arbitration have been abandoned, as we are led to believe. If mistaken in this, they must now be abandoned, when we declare them to be without merit.

The two other defenses are these, viz.: 1. The failure of plaintiffs, for more than thirty-six days after the loss occurred, to furnish the defendant with complete proof of loss, including a builder's estimate as to the value of the property; 2. The inability of the plaintiffs to show that they were the owners of the property in absolute fee-simple.

Let us examine these propositions in order, and with some minuteness.

1. The plea going to the matter of the failure to furnish proof of loss complete, including the builder's estimate, is com-

fessed, and sought to be avoided by an allegation of waiver as to the requirement of the policy touching the furnishing of the builder's estimate by one Hill, the agent of the defendant corporation at Senatobia, and the agent who made the contract for insurance with and issued to the plaintiffs the policy sued upon.

There is a sharp and irreconcilable conflict in the testimony on this point. The evidence of one of the plaintiffs satisfactorily establishes a waiver by the agent, Hill, and the evidence of the agent, Hill, with equal distinctness denies any waiver. This question of fact was submitted to the jury, under fair instructions from the court, and the issue found for plaintiffs. There is left for our determination the sufficiency of the proof to establish the contention that Hill was not a mere local agent, with very narrow powers, but that he was a general agent in a limited territory, clothed with powers ample enough to authorize him to do that particular act which it is alleged he performed on this occasion, viz., waive a part of the required proof of loss.

It may be remarked at this point that the contention of appellant's counsel that there can be no parol waiver by reason of the provision in the policy that such waiver shall be only by writing indorsed on the policy is not maintainable. In *New Orleans Ins. Ass'n v. Matthews*, 65 Miss. 301, this court said that such parol waiver might be made, despite such provision in the policy requiring it to be done in writing, and especially that such stipulation applies only to those conditions and provisions which relate to the formation and continuance of the contract of insurance, and are essential to its binding force while it is running, and does not apply to conditions which are to be performed after loss has occurred.

But was Hill the agent of the defendant corporation in such sense as made him capable of waiving the production of the builder's estimate in this case? It is distinctly shown by the record that on February 24, 1888, Hill was "appointed by the Phenix Insurance Company, of Brooklyn, New York, as its agent for the transaction of the business of insurance in the state of Mississippi during the year 1888."

Under this appointment, was Hill simply a solicitor of insurance,—a mere runner engaged in hunting up persons desiring or needing insurance? or was he the agent of the company in that larger sense that made him stand for and represent the corporation in its dealings with those doing busi-

ness with it? All that could be done by any officer of the company in the management of its accustomed business at Senatobia was clearly within the scope of Hill's authority. Having constituted Hill "its agent for the transaction of the business of insurance in the state of Mississippi during the year 1888," the company had done more than create him a mere local agent with limited powers. It had conferred upon him authority which justified a person dealing with him in regarding him as its general agent, and as authorized to waive a simple condition required to be performed by the insured after loss.

But the controversy would appear to have been put an end to in this state by the opinion of this court in the case of *Rivara v. Queen's Insurance Co.*, 62 Miss. 728. Judge Arnold, in that case, said: "The powers of insurance agents to bind their companies are varied by the character of the functions they are employed to perform. Their powers may be limited by the companies in this respect, but parties dealing with them as to matters within the real or apparent scope of their agency are not affected by such limitations, unless they had notice of the same. An insurance agent clothed with the authority to make contracts of insurance, or to issue policies, stands in the stead of the company to the insured. His acts and declarations in reference to such business are the acts and declarations of the company. The company is bound, not only by notice to such agent, but by anything said or done by him in relation to the contract or risk, either before or after the contract is made."

We are clearly of opinion, therefore, that Hill was a general agent of defendant, and that he might waive the production of the builder's estimate. The jury having found the facts for plaintiffs, as already stated by us, and there being proof to support that finding, we conclude that, on this branch of the case, the contention of appellant is untenable.

2. Let us now consider the remaining ground of defense. The fourth condition in the policy of insurance stipulates that "if the interest of the assured in the property be other than an absolute fee-simple title, . . . it must be so represented to the company and so expressed in the written part of this policy."

It appears that no written application for insurance was ever made by the assured, and one of the plaintiffs testified that he thought he represented orally to Hill that plaintiffs

were the owners of the property. Leaving out of consideration, however, any effect this proof was legitimately entitled to, is the company's contention maintainable as an independent proposition in the case?

In support of their position, appellant's counsel refer us to the outstanding legal title in the surviving executor of Merriweather, and to the supposed imperfection in the execution of the deed from Ward, the attorney in fact, to the plaintiffs, and insist that it is thereby shown that there is not an absolute fee-simple title in the appellees. By the insertion of those words in the conditions of its policies, can it be successfully maintained that the insurance company meant that every loss occurring under its policies, in which the assured should be unable to show a title indefeasible and good against the world, — a title free from every defect, real or seeming, and on which not the smallest cloud rested, — should be borne by the assured? To tolerate such an opinion would be equivalent to holding that the company had deliberately set a trap to ensnare the simple-minded and unwary. The contract of indemnity in multitudes of cases, all over the land, would prove only a delusion and a snare to the victims of premeditated cunning. We cannot believe that any honestly directed and fair-dealing company will deliberately undertake the management of its business on such basis.

What is meant, then, by the words "absolute fee-simple title," in this connection? It can only mean that the assured did not have a limited interest in the property, but that he claimed and held under a deed of conveyance, or other evidence of title, purporting to invest them with an estate in fee-simple. It can only mean that the assured held under a paper title conferring upon them this sort of estate as contradistinguished from any limited and inferior one. The reason for this distinction is obvious. The insurer will not deal with or take the great risk of indemnifying against loss and damage a mere tenant, lease-holder, or other person claiming and having only some qualified interest in the property; but this contract for indemnity will be made only with the person having the title, — the beneficial owner, — the person having the absolute, i. e., the vested as opposed to the contingent or conditional, title.

It was well said by the court in *Liverpool etc. Ins. Co. v. McGwire*, 52 Miss. 231: "Parties applying for insurance are not called on to settle questions of title with very great precision." We repeat and emphasize the remark here.

Applying these principles to the case at bar, we will see that plaintiffs are the sole, undisputed, beneficial owners of the property in question, holding under a conveyance purporting to invest them with an estate in fee-simple. The truth is, so far as this record discloses, plaintiffs are the only persons on earth having any sort of interest in or claim of beneficial ownership to the premises. There is, at the utmost, a mere naked legal title outstanding in one of the three surviving executors of Merriweather, and this executor is the mere trustee of the title for these very plaintiffs and their brothers and sisters, all of said brothers and sisters having conveyed their undivided interests to these plaintiffs. Will any one deny that plaintiffs might not, if thought necessary to protect their title, go into a court of chancery and immediately have the naked legal title divested out of the trustee and invested in themselves?

The appellees are the real owners of the premises; they are the sole owners asserting title; and they must bear the total loss involved in the destruction of the building, unless we shall hold the company liable.

Substantial right and indubitable justice are in the views we have enunciated, and they must be upheld and enforced by an affirmance of the action of the court below:

Affirmed.

INSURANCE.—GENERAL AGENT, WHO IS: See *Foran v. Phoenix Ins. Co.*, 83 Cal. 246; 17 Am. St. Rep. 233; *Continental Ins. Co. v. Ruckman*, 127 Ill. 384; 11 Am. St. Rep. 121; *Travelers Ins. Co. v. Harvey*, 82 Va. 949.

INSURANCE.—PAROL WAIVER OF CONDITION: See *Wheaton v. North British etc. Ins. Co.*, 76 Cal. 415; 9 Am. St. Rep. 216, and particularly note 229-238; *Foran v. Phoenix Ins. Co.*, 83 Cal. 246; 17 Am. St. Rep. 233, and note; *Burlington etc. Ins. Co. v. Gibbons*, 43 Kan. 15; *ante*, p. 118, and note; *German Ins. Co. v. Gray*, 43 Kan. 497; *ante*, p. 150, and note. Where the policy expressly states that the company will not be responsible for any agreement made by its agents except such as shall be indorsed upon the policy in writing, an agent cannot bind the company by a verbal waiver of a condition: *Kendall v. Hicks F. Ins. Co.*, 75 Wis. 198. To constitute a waiver, the company must, by some act of its agent having real or apparent authority, have done something that induced the insured to do or not to do something whereby he was prejudiced: *Weidert v. State Ins. Co.*, 19 Or. 261.

BUCKLEY AND SON v. DUNN.

[57 MISSISSIPPI, 710.]

CREDITOR HAS NO RIGHT TO THE PERSONAL LABOR OF HIS DEBTOR, and therefore cannot complain if such labor is given to another.

EXECUTION — PROCEEDS OF CONTRACT MADE IN WIFE'S NAME. — If a wife enters into a contract to get out cross-ties for a railway company, and her husband conducts the business for her, the ties are not subject to execution in favor of his creditors, though the contract was made in her name for the purpose of preventing the ties from being subject to such execution.

THE question in this case was, whether certain cross-ties were subject to execution under a judgment against George R. Oliphant and in favor of J. C. Dunn. The judgment debtor was desirous of engaging in the business of getting out cross-ties for a certain railway, and applied to J. E. Buckley and Son for advances with which to carry on business. They refused to make such advances, because of the judgment against him, and he thereupon suggested the making of a contract and conducting the business in the name of his wife. This was accordingly done, and Buckley and Son advanced the money required to carry on the business. The contract in the name of Oliphant's wife was made by him for her, and in her name, and she assented to it, and to the transaction of the business in her name. She had no property of any consequence, and no business experience, and her husband managed and attended to the entire business. The ties were got from land owned by another party, under a contract purporting to be with Oliphant, agent of his wife. The court, at the request of plaintiffs, instructed the jury as follows: "If the contract was merely placed in the name of Mrs. Oliphant for the purpose of placing its earnings beyond the reach of G. R. Oliphant's creditors, and if the jury believe that the real contracting party was G. R. Oliphant, and not Mrs. Oliphant, and in good faith on her credit, and that the contract was really G. R. Oliphant's, the plaintiff is entitled to a verdict, and the jury will so find. Whilst the law cannot compel a debtor who is insolvent to work, and whilst the law recognizes it as the first duty of every man to provide for his family, yet the law does not allow a man to place his services and the fruits of his labor and skill beyond the reach of his creditors by making contracts in the name of his wife as a mere cover; and if the jury believe, from all the facts and circumstances, that the contract was placed by G. R. Oliphant in Mrs. Oliphant's name merely as a cover

to protect its assets from Oliphant's creditors, then the placing of such contract in the name of his wife was to hinder and delay and defraud the creditors of Oliphant, and the debt in the hands of the garnishee, except the debt of N. O. & N. E. R. R. Co., for 5,260 ties, delivered January 2, 1890, are liable to the judgment." Verdict and judgment for plaintiff. Claimant appealed.

Witherspoon and Witherspoon, for the appellants.

T. A. Wood, and Fewell and Braham, for the appellees.

COOPER, J. Since the law undoubtedly is, that creditors have no lien upon or right to the labor of their debtors, we are unable to perceive upon what principle the creditor can subject to his debt the product of that labor where, when it comes into existence, it is the property of another. The creditor cannot impute fraud to the transaction by which the debtor gives his labor to his wife, for the creditor has no legal or equitable right to that labor. If by his labor the debtor produces property which is his own, he may not give the property thus produced to the wife to prevent it being subjected to his debts. But this is because the law recognizes an equity in the creditor to be paid out of such property. It is quite a different proposition to assert that creditors have a right to the personal labor of their debtors, and that if the debtor gives that to another, the creditor may complain as of a fraudulent scheme to defeat his demand.

It is perfectly clear that Oliphant refused to make the contract out of which the debt garnished arose because of the apprehension that the product of the contract would be subjected to the appellee's judgment. It is equally certain, as a principle of law, that the creditor could not coerce him to make it, or to perform any labor under it when made by the wife. It is impossible to change the nature of the thing done, by epithets. Oliphant might lawfully have refused to make the contract to supply the cross-ties to the railroads, and so, also, he could lawfully give to his wife his labor and supervision in the execution of the contract made by her, and this, whether the contract was made by her acting personally, or by her acting through her husband as her agent. Calling what was done "a fraudulent device," or "cover," cannot change its nature, nor the legal results that flow from it.

The verdict and judgment should have been for the claimants.

Judgment reversed, and cause remanded.

DEBTOR AND CREDITOR. — A creditor has no claim upon his debtor's services, and has no right to compel the debtor to work and earn money for his benefit, nor is he defrauded if the debtor chooses to work for another gratuitously: *Eilers v. Conradt*, 20 Minn. 242; 12 Am. St. Rep. 641, and note.

CASES
IN THE
SUPREME COURT
OF
NEVADA.

LANG SYNN GOLD-MINING COMPANY v. ROSS.

[20 NEVADA, 127.]

JUDGMENTS, MOTIONS TO VACATE. — Under section 68 of the Practice Act of Nevada, authorizing courts to grant relief against judgment obtained against a party through his mistake, inadvertence, or excusable neglect, relief cannot be granted to a party on whom summons has been personally served, and the service of process on the managing agent of a corporation is a personal service on the corporation itself.

JUDGMENT, RELIEF AGAINST, IN EQUITY. — An averment in a complaint seeking relief against a judgment, that the plaintiff against whom the judgment was rendered was not indebted to the defendant in any sum whatever, is a sufficient statement of a meritorious defense to the original action.

JUDGMENT, RELIEF AGAINST, IN EQUITY. — Though a part of the sum for which a judgment was rendered was justly due, a court of equity will grant relief if such judgment was procured through fraud and conspiracy, and was for a much larger sum than was due.

JUDGMENT, NOTICE OF FRAUD IN PROCURING. — When one knows that the pendency of an action and the service of summons therein have been concealed from the defendant, he is sufficiently put on inquiry as to the defendant's rights; and if he becomes a purchaser at an execution sale based upon a judgment recovered in such action, he is not entitled to the rights of an innocent purchaser. A complaint seeking relief from such judgment, and the sale made thereunder, need not affirmatively allege that such purchaser knew that the judgment defendant had a meritorious defense to the action.

PURCHASER BONA FIDE, WHO IS NOT. — One is not entitled to protection as an innocent purchaser from the fact that he did not participate in a fraud, if he knew that it was being or had been committed. Having this knowledge, he was bound to inquire what were the rights of the party against whom the fraud was practiced.

JUDGMENT, RELIEF FROM. — **STATUTE OF LIMITATION** declaring the time within which action shall be commenced for relief on the ground of

fraud applies to actions for relief from judgment obtained by fraud and conspiracy; and if commenced within the time therein limited, an action cannot be treated as barred by laches.

Crittenden Thornton, for the appellant.

Macmillan and Hannah, for the respondent.

HAWLEY, J. This is an action in equity to set aside, upon the ground of fraud, the judgment, execution, certificate of sale, and deeds thereunder, in the suit of *Gould v. Lang Syne G. M. Co.*, and to compel the respondent to convey to plaintiff the property obtained thereby. The complaint sets forth the facts constituting the alleged fraud, and other matters which it is claimed entitle plaintiff to the relief demanded. Among other things, it is averred that, in 1882, one S. L. Loomis was the general superintendent and managing agent of plaintiff, a corporation organized and existing under and by virtue of the laws of the state of New York; that he presented to plaintiff a claim in the sum of \$3,669.43 for labor and services, which was totally without merit; that plaintiff was not indebted to said Loomis in any sum whatever; that plaintiff promptly denied and repudiated the demand, and refused to pay the same, or any part thereof; that one W. P. Dencla, a laborer, claimed the sum of \$234.35; that plaintiff was indebted to Dencla in a small sum of money, not as much as he claimed, but the precise amount plaintiff is unable to state; that on the 9th of September, 1882, the said Loomis and Dencla, with one James Gould, "contriving and intending to cheat, injure, and defraud this plaintiff, conspired and confederated together to cheat and defraud this plaintiff" out of its real estate and personal property, consisting of mining ground, mining tools and implements, and deprive it of the possession of the same; that in pursuance of this conspiracy, the defendants Loomis and Dencla, without any consideration, made an assignment of their pretended claims against plaintiff to defendant Gould; that defendant Gould, "in the execution of the plans and purposes of said conspiracy," on the 9th of September, 1882, commenced an action in the district court of Humboldt County to recover of and from the plaintiff the full amount of said claims, and caused the summons in said action to be served upon Loomis as the general superintendent and managing agent of plaintiff, with the intent, on the part of defendants Gould, Dencla, and Loomis, to conceal the service of the summons from

plaintiff, and to keep it in ignorance of the pendency of said action; that plaintiff was not informed of the pendency of the said action, or the service of summons, by either of the said defendants; that thereafter, on the 21st of September, 1882, judgment was rendered by default in favor of Gould for the full amount of the demands claimed in said action; that on October 16, 1882, execution in due form of law was issued, and thereafter levied upon the real estate and personal property of plaintiff, and the same was sold at sheriff's sale to the defendant Gould for the face of said judgment, and he received the sheriff's certificate of sale therefor; that the defendant Gould, "by the advice and direction of the said Loomis," assigned to one Robert Page the said certificate of sale as security for the sum of \$1,000, loaned by Page to Loomis, "and in trust by the said Page for the said Loomis as to the balance of the same"; that after the time for redemption had expired, the sheriff executed a deed, in due form of law, for the real property, to Page, "who held the same upon the same terms and the same trusts as he had previously held the said certificates"; that the defendant Ross thereafter entered into negotiations with said Loomis, and purchased the property for \$6,000, of which amount \$2,100 was paid to Loomis, and notes given for the balance, — one of said notes being for the amount due Page, and was paid to Page by Ross; that Page had notice of the conspiracy; that Ross, at and before the payment of any money, "well knew, and had notice of the fact, that said action had been brought in the name of said Gould against this plaintiff, defendant therein, for the use and benefit of the said Loomis and Dencla, and with the intent and purpose that summons therein should be served upon the said Loomis, and that the pendency of said action and the fact of said service should be concealed from this plaintiff, defendant therein, in order to deprive this plaintiff of all and every opportunity to make and assert its just defense therein and thereto, and that this plaintiff was in fact deprived of all and every opportunity to make and assert its just defense therein; that plaintiff did not discover the fact of the pendency of the action and the rendition of the judgment until after the sale of the personal property; that the president of plaintiff, in the city and state of New York, saw the notice of sale under execution published in a Humboldt County newspaper before the sale of the real property had been made, but it was after any possible means

could have been taken to prevent the sale; that plaintiff did not then know of the fraudulent intents, purposes, concealment, and acts of the defendants Loomis, Page, and Gould; that plaintiff immediately entered into correspondence with attorneys residing in Humboldt County, Nevada, and sought all accessible means of information as to the said action, and the alleged causes of action upon which the same was founded, and finally, after at least four months' strenuous effort, succeeded in discovering the facts . . . and the evidence thereof"; that the time had passed for availing itself of the remedy of moving to set aside the judgment on account of surprise, inadvertence, or excusable neglect afforded by the statutes of this state; that there was no remedy by appeal, for the reason that the judgment was regular on its face, and impregnable to attack upon appeal; that the parties to the conspiracy were scattered, and resided at great distances from Humboldt County, to wit, at various named places in the state of California, and all evidence of fraud and wrong-doing on the part of defendants was likewise scattered, and difficult of discovery; that at this time the councils of this plaintiff were divided, and the majority of its directors were opposed to the disbursement of the necessary sums of money to take any legal proceedings tending to relief against said judgment, and that plaintiff was then without funds in its treasury; that all movements to obtain relief have been made by a minority of the stockholders at their own cost and expense, and they are now managing and directing this suit "by the express consent, direction, and authority of the corporation"; that about the month of September, 1884, plaintiff opened negotiations with defendant Ross, for a compromise, which continued for a period of over three months, during which, "at the request of and with the consent of the said defendant, no suit was brought, and at the unsuccessful termination of the said negotiations this suit was in fact brought"; that the mine is of great value; that defendant Ross is, and since the 1st of January, 1885, has been, engaged in extracting ten tons of ore per day therefrom, of the value of thirty dollars per ton; and that plaintiff has been damaged thereby in the sum of \$50,000. The defendant Ross appeared, and interposed a demurrer to the complaint, upon the following grounds: 1. That the court had no jurisdiction of the subject of the action, in this, that the complaint does not show that the plaintiff used or

exhausted its legal remedies; 2. The complaint does not state facts sufficient to constitute a cause of action, in this: *a.* It does not show that the plaintiff has any complete meritorious defense to the action of *Gould v. Lang Syne Co.*; *b.* It does not charge Ross with notice that such a defense, or any defense, existed; *c.* The claim of the plaintiff is stale, and plaintiff is guilty of laches in neglecting to bring this suit for more than two years after it had notice of the fraud and facts now relied upon to sustain this action; *d.* The action is barred by the statute of limitations; 3. The complaint shows that plaintiff had no legal capacity to sue, in this, that this suit was commenced without the authority of the board of directors, or of a majority of the stockholders, of plaintiff. The court sustained this demurrer, upon the ground of laches; and upon the refusal of plaintiff to amend within the time given, the court dismissed plaintiff's complaint, and entered judgment in favor of defendant Ross for his costs. From this judgment plaintiff appeals.

1. The legal remedies suggested by respondent are: 1. That plaintiff could have moved, under the provisions of section 68 of the Practice Act (Gen. Stats. 3090), to set aside the judgment taken against it through its "mistake, inadvertence, or excusable neglect"; 2. That plaintiff could have taken an appeal from the judgment. It is apparent, from the allegations of the complaint, which must, for the purpose of this decision, be taken as true, that neither of these remedies would have afforded plaintiff the relief it seeks. The remedy by motion, if any existed, was lost without any fault or negligence upon the part of plaintiff. The action brought by Gould was commenced September 9th, the default was entered September 21st, and the execution was issued October 16, 1882. The published notice of sale could not, therefore, have been seen by the president of plaintiff in New York, earlier than the 21st of October, 1882. The term of the district court at which the judgment was rendered expired on the 9th of October, 1882: Stats. 1879, 62. The statutory remedy by motion, in cases where there has been a personal service of the summons, is only available during the term at which the judgment is rendered: *Daniels v. Daniels*, 12 Nev. 118, and authorities there cited. The clause in section 68 giving a party the right to move "within six months after the rendition of any judgment in such action to answer to the merits of the original action" only applies to cases where the defend-

ant has not been personally served with the summons: *Jones v. San Francisco Sulphur Co.*, 14 Nev. 174; *Bibend v. Kreutz*, 20 Cal. 114; *Casement v. Ringgold*, 28 Cal. 338. The service of the summons upon the managing agent was a personal service upon the corporation: Gen. Stats. 3051. The judgment was regular upon its face, and an appeal therefrom would not have afforded plaintiff any relief.

2. The averment in the complaint that plaintiff was not indebted to defendant Loomis in any sum or amount whatever is a sufficient statement of a meritorious defense. It is true, as claimed by respondent, that there is no sufficient denial of the indebtedness due to the defendant Dencla, and the meritorious defense does not reach the entire amount of the judgment; but if it be true, as alleged, that defendants Loomis, Gould, and Dencla conspired together to conceal the commencement and pendency of the action from the plaintiff, so as to obtain a judgment against it for nearly four thousand dollars, when less than two hundred and fifty dollars was due and owing from it, they committed such a fraud upon the plaintiff as entitles it to relief in a court of equity against them.

3. The notice of defendant Ross, as alleged in the complaint, as to the concealment of the pendency of the action, and service of the summons, from the plaintiff, was sufficient to put him on inquiry as to the rights of the corporation and to deprive him of the rights of an innocent purchaser. It was therefore unnecessary for the plaintiff to allege that defendant Ross knew, at the time of his purchase, that it had a meritorious defense to the action of *Gould v. Lang Syne M. Co.* Pomeroy, in discussing the effect of notices, says: "Whenever a party has information or knowledge of certain extraneous facts which of themselves do not amount to, nor tend to show, an actual notice, but which are sufficient to put a reasonably prudent man upon an inquiry respecting a conflicting interest, claim, or right, and the circumstances are such that the inquiry, if made and followed up with reasonable care and diligence, would lead to the discovery of the truth,—to a knowledge of the interest, claim, or right which really exists,—then the party is absolutely charged with a constructive notice of such interest, claim, or right. The presumption of knowledge is then conclusive": 2 Pomeroy's Eq. Jur., sec. 608. See also, to the same effect, 1 Story's Eq. Jur., secs. 400 et seq.; Kerr on Fraud and Mistake, 316 et seq. Having

notice that Loomis had conspired with other parties to conceal the service of the summons and the pendency of the action, Ross must have known that a fraud was thereby committed against the corporation. He was bound to know that Loomis could not represent in himself two opposite and conflicting interests. He is not entitled to protection as an innocent purchaser from the fact that he did not participate in the fraud. Having notice that a fraud was committed, he was bound to inquire what the rights of the corporation were. "It will not do for a purchaser to close his eyes to facts which were open to his investigation by the exercise of that diligence which the law imposes. Such purchasers are not protected": *Brush v. Ware*, 15 Pet. 111. Ross, in purchasing the title of Gould, with the notice of the facts averred in the complaint, was chargeable with notice of the fraud, however ignorant he may have been of the rights of the corporation, and however honest his intentions were: *Hardy v. Harbin*, 4 Saw. 549. The complaint states a good cause of action against him. It shows that the judgment of *Gould v. Lang Syne M. Co.* was obtained by the fraudulent practices of Loomis, Gould, and Dencla, and that Ross had notice of those fraudulent practices when he bought the property. "If all this can be established by proof, it seems to us that the plaintiff should not be remediless in a court of equity": *Hayden v. Hayden*, 46 Cal. 341.

4. "A defense peculiar to courts of equity is founded upon the mere lapse of time and the staleness of the claim, in cases where no statute of limitations directly governs the case. In such cases, courts of equity act sometimes by analogy to the law, and sometimes act upon their own inherent doctrine of discouraging, for the peace of society, antiquated demands, by refusing to interfere when there has been gross laches in prosecuting rights, or long and unreasonable acquiescence in the assertion of adverse rights": 2 Story's Eq. Jur., sec. 1520. It was upon this ground that the court below sustained the demurrer. The district judge, in rendering his opinion, expressed doubts as to whether the points upon which his decision was rendered were "fairly raised upon the complaint alone." We are of opinion that the facts which seem to have controlled the judgment of the district court are not "fairly raised" or presented by the averments in the complaint. It does not appear therefrom that the mining property was comparatively worthless at the time it was sold at sheriff's sale. There is nothing upon the face of the complaint which affirmatively

shows that the property was of any greater value when this action was commenced than it was at the time of the sheriff's sale, or at the time of plaintiff's purchase. The case, as made out by the complaint, is not, in our opinion, brought within the facts that governed many, if not all, of the decisions cited and relied upon by respondent upon this point, and the correctness of which, upon the particular facts of each case, are not questioned.

We are well aware that the value of mining claims is ordinarily of a very fluctuating character; that, as stated by the supreme court of the United States in *Twin Lick Oil Co. v. Marbury*, 91 U. S. 592, "property worth thousands to-day is worth nothing to-morrow, and that which would to-day sell for a thousand dollars as its fair value may, by the natural changes of a week, or the energy and courage of desperate enterprise in the same time, be made to yield that much every day. The injustice, therefore, is obvious, of permitting one holding the right to an ownership in such property to voluntarily await the event, and then decide, when the danger which is over has been at the risk of another, to come in and share the profit." In such cases the courts have repeatedly declared that the party claiming rights to the property must "put forward his complaint at the earliest possible moment," and that he "is bound to act with reasonable diligence as soon as the fraud is discovered." There is nothing that can call forth a court of equity into activity "but conscience, good faith, and reasonable diligence." It does not affirmatively appear upon the face of the complaint in this action that at the time of the discovery of the fraud the plaintiff considered that the property was worthless; that it kept silent, waiting for the defendant Ross to develop the mine; and that then, after the value of the mine had been established by his labor, expense, and hazard, the plaintiff commenced this action "to rob him of the fruits of his industry and enterprise." It may be that upon issues of fact and proofs made upon the trial such a state of facts may be presented. But our decision upon the questions of law raised by the demurrer must be governed solely by the sufficiency of the allegations of the complaint. We have no right to anticipate what the evidence will be. As previously stated, the averments of the complaint must, for the purposes of this decision, be taken as true. The statute of limitations in this state declares that "an action for relief on the ground of fraud, the cause of action in such case not to

be deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud," can only be commenced within three years: Gen. Stats. 8644. This action was commenced within that time, and hence it is not barred by the statute of limitations. This statute "embraces all character of actions, legal and equitable, and is as obligatory upon the courts in a suit in equity as in actions at law": *White v. Sheldon*, 4 Nev. 288; *Lord v. Morris*, 18 Cal. 486; *Hardy v. Harbin*, 4 Saw. 548; *Norton v. Meader*, 4 Saw. 615. "The statutes of limitations, where they are addressed to courts of equity as well as to courts of law, as they seem to be in all cases of concurrent jurisdiction at law and in equity, . . . to which they they directly apply, seem equally obligatory in each court. It has been very justly observed, that in such cases courts of equity do not act so much in analogy to the statutes as in obedience to them": 2 Story's Eq. Jur., sec. 1520; *Norris v. Haggin*, 28 Fed. Rep. 278, and authorities there cited. Applying these principles to the case at bar, it is very clear that mere lapse of time, not extending beyond the period fixed in the statute of limitations for the commencement of the suit, constitutes no bar to the action.

5. In the light of the averment in the complaint that this action was commenced "by the express consent, direction, and authority of the corporation," it is manifest that the point stated in the demurrer, that plaintiff has no legal capacity to sue, is not well taken.

The judgment of the district court is reversed, and cause remanded. The district court will designate a reasonable time for the defendant to answer the complaint.

CORPORATIONS, SERVICE OF PROCESS UPON. — Service of process upon the general agent of a corporation is binding upon the latter: *Great West Min. Co. v. Woodmas*, 12 Col. 46; 13 Am. St. Rep. 204, and note.

JUDGMENTS, VACATION OF. — What amounts to surprise, mistake, inadvertence, or excusable neglect, to entitle a party to the right to have a judgment against him set aside: See note to *Barnham v. Hays*, 58 Am. Dec. 397, 398.

JUDGMENTS, VACATION OF.—FRAUD. — Fraud will vitiate judgments and proceedings passed upon them: *Giddings v. Steele*, 28 Tex. 733; 91 Am. Dec. 336.

BONA FIDE PURCHASER, WHO IS. — One cannot be a *bona fide* purchaser, if he has notice actual or constructive: *Arnold v. Hagerman*, 45 N. J. Eq. 186; 14 Am. St. Rep. 712, and note.

WHAT CONSTITUTES LACHES IN CASES OF FRAUD: See note to *Bell v. Hudson*, 2 Am. St. Rep. 801, 802.

LIMITATIONS OF ACTIONS IN CASES OF FRAUD: See *Hensley v. Page*, 77 Iowa, 239; 14 Am. St. Rep. 275, and note.

STATE v. FINDLAY.

[20 NEVADA, 198.]

ELECTIONS — CONSTITUTIONAL LAW. — QUALIFICATIONS OF A VOTER, PRESCRIBED BY THE CONSTITUTION of a state, cannot be abridged, extended, or changed by the legislature.

ELECTIONS — CONSTITUTIONAL LAW. — STATUTE DECLARING THAT NO MORMON, OR MEMBER of the Church of Jesus Christ of Latter Day Saints, shall be allowed to vote at an election in this state is invalid, because in conflict with the provisions of the state constitution extending the right of suffrage to all male citizens of the United States of the age of twenty-one years and upward who have not been convicted of felony or treason.

ELECTIONS — CONSTITUTIONAL LAW. — STATUTE FOR THE REGISTRATION OF VOTERS, which requires a voter, in order to entitle himself to registration, to take an oath that he is not a Mormon, is unconstitutional and void, because it, in effect, imposes a qualification in addition to those required by the constitution of the state.

Trenmor Coffin and George S. Sawyer, for the relator.

J. D. Torreyson and Thomas H. Wells, for the respondent.

HAWLEY, J. Relator applied to respondent, a justice of the peace and *ex officio* registry agent of Panaca township, in Lincoln County, to be registered as a voter, and offered to take the oath required by the act providing for the registration of the names of the electors: Gen. Stats. 1505. The registry agent refused to register his name unless he took the oath required by the "act prescribing the qualifications and modifying the oath for the registration of voters in conformity therewith": Stats. 1887, 106. This proceeding was thereupon instituted for the purpose of testing the validity of that act. Relator, in his application for a *mandamus* to compel respondent to register his name, affirmatively shows that he possesses all the qualifications of an elector, as prescribed by the constitution of this state: Const., art. 2, sec. 1; that he could not take the oath prescribed by the act of 1887, because he is a member of and belongs to the "Church of Jesus Christ of Latter Day Saints," commonly called the "Mormon Church," and this was the only reason why he refused to take said oath. Upon the hearing of this case, it appearing so clearly to our minds that the relator was entitled to be registered, we ordered the writ to issue as prayed for by relator.

Section 1 of article 2 of the constitution provides that "every male citizen of the United States (not laboring under the disabilities named in this constitution) of the age of twenty-one

years and upwards who shall have actually, and not constructively, resided in the state six months, and in the district or county thirty days next preceding any election, shall be entitled to vote for all officers that now are or hereafter may be elected by the people, and upon all questions submitted to the electors at such election; provided, that no person who has been or may be convicted of treason or felony in any state or territory of the United States, unless restored to civil rights, and no person who, after arriving at the age of eighteen years, shall have voluntarily borne arms against the United States, or held civil or military office under the so-called Confederate States, or either of them, unless an amnesty be granted to such by the federal government, and no idiot or insane person, shall be entitled to the privilege of an elector." Any citizen possessing the qualifications of an elector, as defined and declared in this provision of the constitution, and who is not disqualified by any of the provisions thereof, is entitled to the right of suffrage. It is not within the power of the legislature to deny, abridge, extend, or change the qualifications of a voter as prescribed by the constitution of the state: *Davies v. McKeeby*, 5 Nev. 369; *Clayton v. Harris*, 7 Nev. 64; *State v. Williams*, 5 Wis. 308; 68 Am. Dec. 65; *State v. Baker*, 38 Wis. 86; *Quinn v. State*, 35 Ind. 490; 9 Am. Rep. 754; *Monroe v. Collins*, 17 Ohio St. 685; *McCafferty v. Guyer*, 59 Pa. St. 111; *Kinneen v. Wells*, 144 Mass. 497; 59 Am. Rep. 105; *Rison v. Farr*, 24 Ark. 162; 87 Am. Dec. 52; *People v. Canaday*, 78 N. C. 222; 21 Am. Rep. 465. The legislature, by the act of 1887, adopted additional disqualifications to those mentioned in the constitution, by declaring in positive terms that "no person shall be allowed to vote at an election in this state . . . who is a member of or belongs to the 'Church of Jesus Christ of Latter Day Saints,' commonly called the 'Mormon Church'": Stats. 1887, p. 107, sec. 1; and in the same act sought to amend the oath to be administered to the elector by the registry agent, under the provisions of the registration law, by adding thereto that the elector was not a member of nor belonged to "the Church of Jesus Christ of Latter Day Saints, commonly called the 'Mormon Church'": Sec. 2. The act was a direct attempt, in violation of the provisions of the constitution, to disfranchise the members of the Mormon Church; to deny them the right of suffrage regardless of the question whether or not they possessed the qualifications of an elector as defined in the constitution.

It was suggested by respondent's counsel that the act of 1887 was, perhaps, authorized by the provisions of section 6, article 2, of the constitution, which declares that "provision shall be made by law for the registration of the names of the electors within the counties of which they may be residents, and for the ascertainment, by proper proofs, of the persons who shall be entitled to the right of suffrage, as hereby established, to preserve the purity of elections, and to regulate the manner of holding and making returns of the same; and the legislature shall have power to prescribe by law any other or further rules or oaths as may be deemed necessary, as a test of electoral qualifications." The other or further rules or oaths which the legislature may prescribe are such as may be deemed necessary "for the ascertainment, by proper proofs, of the persons who shall be entitled to the right of suffrage," as established by the provisions of section 1 of article 2 of the constitution. Having adopted a provision for the registration of voters, the framers of the constitution deemed it proper to give the legislature the power to enact such rules and prescribe such oaths as might be necessary in order to determine who was entitled to be registered; and this could only be done by ascertaining in advance, by proper and reasonable proofs, the persons who would on the day of election, under the provisions of the constitution, be entitled to vote. If the view suggested by respondent's counsel, that the legislature has the power, under the guise of adopting further rules or oaths as a test of electoral qualifications, to declare, as set forth in the preamble to the act of 1887, that "it is deemed necessary for the peace and safety of the people of this state to exclude from participation in the electoral franchise all persons belonging to the self-styled 'Church of Jesus Christ of Latter Day Saints,' commonly called the 'Mormon Church,'" then, of course, it could by like methods exclude from the elective franchise all persons belonging to any other church, or members of any particular political party, social organization, or benevolent order. In brief, the right of suffrage guaranteed by the constitution, and of which we boast so much, would be placed entirely at the mercy, will, or caprice of the legislature. The legislature has no such power. The right of suffrage, as conferred by the constitution, is beyond the reach of any such legislative interference. It cannot be changed except by the power that established it, viz., the people, in their direct sovereign capacity. In *McCafferty v. Guyer*, 59 Pa. St.

111, where the legislature attempted to disfranchise certain persons who were not disfranchised by the provisions of the constitution from voting, the court, in reviewing the provisions of the act, said: "It attempts to disfranchise those who were enfranchised by the fundamental law of the commonwealth, and it enacts what shall be the evidence of disfranchisement. It is not, it does not profess to be, a regulation of the mode of exercise of the right to an elective franchise. It is a deprivation of the right itself. Can, then, the legislature take away from an elector his right to vote, while he possesses all the qualifications required by the constitution? This is the question now before us. When a citizen goes to the polls on an election day, with the constitution in his hand, and presents it as giving him a right to vote, can he be told, 'True, you have every qualification that instrument requires. It declares you entitled to the right of an elector, but an act of assembly forbids your vote, and therefore it cannot be received'? If so, the legislative power is superior to the organic law of the state; and the legislature, instead of being controlled by it, may mold the constitution at their pleasure. Such is not the law." The legislature may adopt such rules and prescribe such oaths as may be deemed necessary to test the qualifications of an elector. It also has the power to adopt such reasonable regulations of the constitutional rights of a voter as may be deemed necessary to preserve order at elections, to guard against fraud, undue influence, or oppression, and to preserve the purity of the ballot. "All regulations of the elective franchise, however, must be reasonable, uniform, and impartial. They must not have for their purpose, directly or indirectly, to deny or abridge the constitutional right of citizens to vote, or unnecessarily to impede its exercise; if they do, they must be declared void": Cooley's Constitutional Limitations, 758; *Daggett v. Hudson*, 43 Ohio St. 548; 54 Am. Rep. 832; *State v. Butts*, 31 Kan. 554; *Capen v. Foster*, 12 Pick. 488; 23 Am. Dec. 632; *Page v. Allen*, 58 Pa. St. 346, 347; 98 Am. Dec. 272; *McMahon v. Mayor*, 66 Ga. 224; 42 Am. Rep. 65.

The reasons we have stated are amply sufficient to justify the issuance of the writ of *mandamus* as prayed for, and we therefore deem it unnecessary to discuss the other points presented by relator, as to whether or not the act is repugnant to the provisions of section 4 of article 1 of the constitution.

ELECTIONS—STATUTORY RESTRICTIONS UPON THE QUALIFICATIONS OF VOTERS. — When the constitution of a state has prescribed qualifications for voters, it is not competent for the legislature to add to or in any way alter such prescribed qualifications unless the power to do so is expressly, or by necessary implication, conferred upon it by the constitution itself: Note to *Blair v. Ridgley*, 97 Am. Dec. 264-266; note to *Rison v. Farr*, 87 Am. Dec. 64, 65.

POWELL v. CAMPBELL.

[20 NEVADA, 232.]

DIVORCE—POWER OF COURT TO VEST TITLE OF HUSBAND'S PROPERTY IN WIFE. — Under a statute declaring that on the granting of a divorce, the court may set apart such portion of the husband's property for the support of the wife and children as shall be deemed just and equitable, the court may decree that the title to a portion of the husband's separate estate, real or personal, or both, be vested in the wife.

LES PENDENS—DIVORCE. — If a wife who sues for a divorce describes in the complaint the property of her husband, and asks to have it set aside to her for her support, the rule of *les pendens* can be invoked by her against one who purchases during the pendency of the action, and with notice thereof.

LES PENDENS IS NOTICE OF ALL FACTS APPARENT on the face of the plea, and of those other facts of which the facts so stated necessarily put the purchaser on inquiry.

LES PENDENS—ESTOPPEL. — The fact that a wife, during the pendency of a suit for divorce, told her husband that he could sell certain property if he wished to cannot limit the effect of a decree subsequently rendered in that suit, setting aside such property to her, nor can it entitle a purchaser from the husband, with notice of the suit, to retain the property, if it has been set aside to the wife, there being no claim that such purchaser knew of or acted upon the alleged assent of the wife that her husband might sell.

PRACTION—PARTIES DEFENDANT. — In an action to set aside a deed made by a husband pending a suit for a divorce, the husband is not a necessary party defendant if a decree has been entered in a divorce suit vesting the title in his wife, and the purchaser of the property (who was the defendant in the present action) purchased of the husband with actual notice of the pendency of the suit, and that a part of the relief therein sought was the setting aside to the wife of the property in controversy.

LES PENDENS, COMPELLING CONVEYANCE OF PROPERTY BOUGHT SUBJECT TO. — Though a purchaser of property pending a suit against the vendor for a divorce takes the property subject to the final decree in such suit, and though such decree purports to vest the title in the wife, still she may maintain an action against such purchaser to compel him, by his conveyance, to vest an unquestionable legal title in her.

R. H. Lindsay and R. M. Clarke, for the appellant.

William Webster and S. D. King, for the respondent.

LEONARD, C. J. On the — day of March, 1886, respondent commenced an action in the district court of Washoe County, to obtain a decree of divorce *a vinculo* against her husband, Richard Powell, on the ground of extreme cruelty. In her complaint she fully and specifically described certain lands whereon was the residence of Powell and wife, and certain personal property, all the separate property of the said Powell of the value of about three thousand dollars, which she alleged might, by order of the court, be applied to her support and maintenance, and in aid of the prosecution of her action against the defendant. She also alleged that said property was all the property owned by the defendant; that she was without means to prosecute her action, that she was impenunious, and in delicate health; that her health had suffered because of the defendant's cruelty towards her; that she was dependent upon her friends and relatives for support and subsistence. She prayed for a decree of divorce, and that all the real and personal property of the defendant be set apart to her for her support and maintenance, except such as might be appropriated for her maintenance and in aid of her action against the defendant, pending litigation; that the title to the real property of defendant be decreed to her; and for such other relief as she might be entitled to receive.

Personal service of summons, attached to a certified copy of the complaint, was made upon the defendant, Powell, in Washoe County, March 3, 1886. Defendant appeared for the purpose of contesting plaintiff's application for an allowance for suit money and support pending the litigation, but he failed to answer the complaint, or to appear in the action, except as before stated.

On the thirtieth day of March, 1886, the cause came on for trial. Plaintiff introduced her evidence, and it appearing that defendant's default had been entered, the court entered a decree dissolving the marriage of plaintiff and defendant, "and that the plaintiff do have for her support, from and out of the separate property of the defendant, two horses and their harness and one wagon, . . . described in the complaint and findings of fact filed in said action; . . . that plaintiff have title to said property, and all of it, against the defendant, and that she have possession thereof; ~~that~~ plaintiff do have against the defendant, and from and out of his separate property, the following described real property, and real property interests and appurtenances, to wit [then fol-

lowing a definite description, as stated in the complaint]. It is ordered, adjudged, and decreed by the court that the title to said land and water, and the use of said water, together with the improvements and appurtenances with said lands and water, and the use of said water, be, and the same is, taken from and out of the defendant, and placed in and confirmed to the plaintiff, and to her heirs and assigns, and that she have possession thereof as against the defendant." March 25, 1886, pending the divorce suit, defendant in this action took a deed of conveyance to himself from Richard Powell of all the real property and property rights described in the complaint and decree in the divorce case, and a transfer and assignment of all the personal property described therein; and at the commencement of this action this defendant still held the title and possession of said real property. The decree in the divorce case remains unreversed and unmodified.

Prior to and at the time he received said conveyance, and before making any payment on account of said purchase, defendant had actual personal knowledge of the pendency of the divorce suit of *Powell v. Powell*, and that the title and disposition of all of said property, real and personal, was involved in said action, and that the plaintiff therein claimed and demanded relief therein in respect of all of said property. The value of the property sold by Powell to defendant was at least three thousand dollars, while the price paid was but one thousand four hundred dollars.

This action was commenced June 26, 1886, to annul the deed from Powell to defendant, and to compel the latter to convey to plaintiff, by good and sufficient deed, the real property described in Powell's deed to him. Defendant, Campbell, appeared and answered. In her complaint, plaintiff charges that Powell gave, and Campbell received, the deed above mentioned, with intent to cheat and defraud plaintiff, and to defeat the operation of any judgment that might be recovered in the said divorce suit; but the findings do not cover this issue. The court proceeded upon the theory that defendant was a purchaser *pendente lite*, with actual knowledge of the then pending suit for divorce, the property to be affected thereby, and the relief demanded; that in this action he was as conclusively bound by the decree in that case as he would have been if he had been made a party defendant; and that plaintiff could maintain this action to acquire from him the legal title to property to which she had acquired the

equitable title in the divorce suit. A decree was entered accordingly. From that decree, and an order overruling defendant's motion for a new trial, this appeal is taken.

At the trial, plaintiff offered and the court admitted in evidence the judgment roll in the case of *Powell v. Powell*, against defendant's objections, based upon several grounds stated, the first and most important of which was as follows: "That said judgment roll, decree, and each and all of said papers, are irrelevant, immaterial, and incompetent as evidence for any purpose in this case, for the reason that the said decree is a nullity, in so far as it attempts to divest the title of the property mentioned in said decree out of Richard Powell, and vest it in the plaintiff in this action." The fourth is as follows: "It being admitted by the pleadings in this action that all the property in dispute herein was, before the commencement of the action of *Powell v. Powell*, the separate property of Richard Powell, the court which tried said action had no power to decree the title to any of it to the plaintiff in said divorce case."

These grounds of objection may be considered together. If, under the statute, the district court has power, in any suit for divorce on the ground of extreme cruelty of the husband, to divest him of the title of his separate property, and invest the wife with the same, so far as that may be done by a decree, then the objection made upon the grounds above stated was not well taken; because, if there was power, then the most that can be claimed is, that it was error to decree the title, and the decree cannot be assailed collaterally. It is undoubtedly true that if the court had power to decree the title, such power must be found in the statute: *Perkins v. Perkins*, 16 Mich. 167; *Bacon v. Bacon*, 43 Wis. 202; *Donovan v. Donovan*, 20 Wis. 586; *Barker v. Dayton*, 23 Wis. 379.

Does our statute, in a proper case, confer such power?

In *Wuest v. Wuest*, 17 Nev. 221, upon the facts shown, the court upheld a decree awarding certain real estate to the wife absolutely.

In *Lake v. Bender*, 18 Nev. 402, we did say, and now reiterate the same, that the object of the statute was to provide proper support for the wife and minor children, and that the legislative intent to limit the disposition of the husband's property to their proper support was manifest. In that case, where there was a direct appeal, and where, consequently, we could consider mere errors, the court below had decreed to

Mrs. Lake \$150 per month for her support, and made the same a charge and lien upon certain real estate. She appealed, and it was urged in her behalf that Lake's separate property should have been divided between the spouses, and that in making an order for a monthly payment of \$150 the court abused its discretion. It was to this claim for a division under the circumstances that we directed our argument, and we tried to show that in the case then in hand a decree investing Mrs. Lake with the title to specific property was not necessary for her proper support, and consequently that it should not be granted. If in an action of this character the statute permits the court to decree to the wife any portion of the husband's separate property absolutely, it should never be done unless such action is reasonably necessary for the accomplishment of the primary object of the statute, — support of the wife and minor children; and if in any case the discretion of the trial court should be abused, this court, upon direct appeal, would not fail to correct the error.

The statute provides that "when the marriage shall be dissolved by the husband being sentenced to imprisonment, and when a divorce shall be ordered for the cause of adultery committed by the husband, the wife shall be entitled to the same proportion of his lands and property as if he were dead; but in other cases the court may set apart such portion for her support and the support of their children as shall be deemed just and equitable": Gen. Stats. 496.

The court may "set apart" so much of the husband's separate property, in case of divorce for extreme cruelty, as, under the circumstances, is just and reasonable, for the support of the wife and their children. If more is set apart than is just and reasonable for support, it is error; but until reversed or modified on appeal, the decree in this respect is not void. Does the power to set apart include the power to decree the husband's title to her, if in a given case it is necessary to do so in order to provide proper support for the wife and children? In this, as in all other cases of statutory construction, we must find, if possible, the legislative intent, and in an earnest endeavor to do so in this case, the first thought that comes to our minds is, as before stated, that the primary object of the legislature was to give the wife and children a support out of his property; and if the accomplishment of this object depends upon decreeing to her the title, what good reason can be given for withholding it? Is the entire title any

more sacred than the absolute right of use for life, if the whole is required?

The learned counsel for appellant say: "The pretense that clothing the wife with the absolute title to the husband's property, and imposing no restrictions upon its disposal, is doing nothing more than setting it apart for her support, is too absurd for argument." Let us see. The section of the statute under consideration was first passed by the legislature of 1861: Stats. 1861, p. 99, sec. 27. That section was amended in 1865 (Stats. 1864-65, 99), although the amended section, in respect to the part under consideration, is substantially the same as the original. The divorce act of 1861 was passed November 23, 1861. The following day the probate act was passed: Stats. 1861, 186; and yet in the last-named act these words are used: "If there is no law in force exempting property from execution, the following shall be set apart for the use of the widow or minor child or children, and shall not be subject to administration. . . . When property shall have been set apart for the use of the family, in accordance with the provisions of this chapter, if the deceased shall have left a widow, and no minor child, such property shall be the property of the widow. If he shall have left, also, a minor child or children, the one half of such property shall belong to the widow, and the remainder to the child, or in equal shares to the children, if there be more than one. If there be no widow, the whole shall belong to the minor child or children." And in the fourth section of the homestead act of 1865 (Gen. Stats. 542) is this language: "The homestead and all other property exempt by law from sale under execution shall, upon the death of either spouse, be set apart by the court as the sole property of the surviving spouse, for his or her benefit, and that of his or her legitimate child or children." So we see that in the probate act or homestead law, the words "set apart" were used in the sense that property set apart should belong absolutely to the persons for whose benefit the statute made provision. It is true that in the divorce act it is not declared that the property set apart for the support of the wife and children shall belong to the wife, and for a good reason. The legislature intended only to provide support out of his property, and it was not intended that the title should be set apart unless necessity required it. But if such necessity exists, why may not the words "set apart" have as broad meaning as they are declared to have in the other statutes quoted?

Again, if in no case can the court decree to the wife any portion of the husband's real estate in its entirety, then the same is true in relation to his personal property. No greater power is given in one case than in the other. Did the same legislature that gave to widows and fatherless children, absolutely, a liberal amount of property, including household goods, intend in all cases to prohibit courts from providing the same security of home and support to the woman who is compelled to seek the law's protection against the husband's cruelties and indignities? The language and spirit of the divorce law do not show such intention, and the same words used in the other statutes referred to lead the mind to an opposite conclusion. Authorities upon this question differ greatly, because they are generally based upon dissimilar statutes. But an examination, as brief as possible, of some of them will, we think, sustain our conclusion.

Counsel for appellant refer us to *Maguire v. Maguire*, 7 Dana, 187; *Rogers v. Vines*, 6 Ired. 293; *Darrenberger v. Haupt*, 10 Nev. 43; *Lake v. Bender*, 18 Nev. 402.

The last two are not opposed to our construction.

In *Maguire v. Maguire*, 7 Dana, 187, the court decreed a divorce *a vinculo*, allowed the wife to marry again after two years, interdicted a future marriage by the husband, and secured to the wife all the property owned by her in her own right at the time of her marriage. The case was taken to the court of appeals by writ of error for a revision of the decree. The court said: "But the decree itself is not for alimony, and if it had been such, it would be erroneous; because it does not secure to the wife, as wife, an annuity, or other personal right to maintenance, but it purports to confirm to her, as a *feme sole*, the absolute title to property, which should never be done in case of mere alimony." The seventh section of the statute of 1809, under which the chancellor proceeded in that case, was as follows: "The court pronouncing the decree of divorce shall regulate and order the division of the estate, real and personal, in such way as to them shall seem just and right, having due regard to each party, and the children, if any; provided, however, that nothing herein contained shall be construed to authorize the court to compel either of the parties to divest himself or herself of the title to the real estate": 1 Litt. & S. Dig. Ky. Stats. (1822), 443. Under such a statute, the decision is not an authority against our conclusion under our statute. The

same may be said of *Quisenberry v. Quisenberry*, 1 Duvall, 198; *Lovett v. Lovett*, 11 Ala. 767; *Fishli v. Fishli*, 2 Litt. 227.

But *Berthelemy v. Johnson*, 3 B. Mon. 90, 38 Am. Dec. 179, does throw light upon our case. We quote from the opinion: "Jacques C. Berthelemy seeks the reversal of a judgment in bar of an action of ejectment brought by him against Cave Johnson, the defendant in error. The plaintiff claims a legal right of entry in the land in contest, as sole heir of his deceased father, to whom the defendant had conveyed the title in fee in the year 1797. The defendant relied on a divorce a vinculo of the wife of the decedent, adjudged in virtue of an act of assembly passed in December, 1803; a judicial sentence declaring that the fee-simple title to said land should vest absolutely in the divorced wife; and a subsequent sale and conveyance of it by her to him. . . . The same enactment (1803) authorized the court, without qualification as to mode, to secure to the wife support out of the husband's estate, and the court adjudged that the fee-simple to the said tract of land should vest in her as one of the means of securing that support. This did not, in our opinion, exceed either the legislative power, or the plenary discretion confided to the court; and therefore, were it deemed erroneous, it would not be void." We have not been able to find the act of assembly referred to, but, taking the court's statement of its provisions as correct, they were, in substance and effect, like ours.

In *Rogers v. Vines*, 6 Ired. 293, the question was, whether, under the statute, when slaves were assigned to the wife for alimony out of the husband's estate, she had the absolute property in them. The statute authorized the court to allow her such alimony as her husband's circumstances would permit, not exceeding one third of the annual income or profits of his estate or occupation, or to assign to her separate use such part of the real and personal estate of the husband as the court should think fit, not exceeding one third part thereof, as the justice of the case might require, which should continue until a reconciliation should take place between the parties. The court held that the provision that her separate use should continue until reconciliation was absolutely inconsistent with the power of sale in the wife; because either the sale would prevent the re-vesting of the property in the husband upon a reconciliation, which would defeat the policy of the legislature, and directly contradict the act, or the wife would have the power of defeating her sale by returning to her husband, which the legis-

lature could not have intended. The conclusion of the court was, that the separate enjoyment of specific things was given as alimony in lieu of money, and that the wife's right was, by its nature and the terms of the statute, limited to the period of separation, and that it terminated by the death of either.

In *Calame v. Calame*, 25 N.J. Eq. 548, the decision was similar to that in *Rogers v. Vines*, 6 Ired. 293. The statute provided that the court might make such order touching alimony and maintenance of the wife and children by the husband as should be fit, reasonable, and just. It then provided the manner and means of enforcing payment. The court held that the modes appointed to enforce payment of the alimony, such as requiring security from the husband, and authorizing the sequestration of his personal estate, and the rents and profits of his real estate, were in opposition to the idea that a part of the land itself could be set apart for the wife. And from the entire statute it was held that the words "alimony" and "maintenance" were used in their established technical sense; that is, money payments of the character of an annuity. The two cases last referred to are not against our conclusion. The words "alimony" and "maintenance" are not used in the body of our statute, and there are no similar provisions indicating an intention shown in the North Carolina and New Jersey statutes.

In Illinois, the statute authorizes courts to make such order touching alimony and maintenance of the wife, and the care, custody, and support of the children, as shall be fit, reasonable, and just; and when the wife is complainant, to order the husband to give reasonable security for such alimony and maintenance, or to enforce the payment of such alimony and maintenance in any other manner consistent with the practice of the court. And the court may, from time to time, make such alterations in the allowance of alimony and maintenance as shall appear reasonable and proper: *Scates's Stats.*, sec. 6, p. 151. Yet under this statute, similar in most respects to that of New Jersey, the supreme court has held in many cases that courts have power to assign, as alimony, to the wife, a part of the real estate of the husband, but has said, at the same time, that this should not be done, except under special circumstances rendering such action necessary for the support of the wife and children.

In Ohio, under a statute allowing alimony out of the husband's real and personal property, "which may be allowed in

real or personal property," the supreme court held that if allowed in real property, it was not error to decree to her the absolute title in fee: *Broadwell v. Broadwell*, 21 Ohio St. 657. Without a further examination of authorities, our conclusion is, that if, in the proper accomplishment of the primary object of the statute, — the support of the wife and children, — it is reasonably necessary to invest the wife with the husband's title to property; if, in other words, without an investiture of the title the object of the statute will be defeated, then the statute permits such investiture in the wife, as one of the means of securing her support.

In an action for divorce, where the complaining wife alleges her necessities and the defendant's abilities, and asks that certain particularly described real estate be set apart and decreed to her for her support, can the rule of *lis pendens* be invoked by the wife against one who purchases *pendente lite*, with actual notice of the divorce suit and other facts before stated? We think it can, upon reason and authority. The statute provides that if either party is about to do any act that may defeat or render less effectual any order which the court may ultimately make concerning property, an order shall be made for the preservation thereof. It is claimed that this remedy is exclusive; that unless restrained, Powell's sale to defendant was valid. Our opinion is, that this preventive remedy does not affect the ordinary rule as to purchasers *pendente lite*, if this is a case where that rule can be invoked.

"In order to bring the doctrine of *lis pendens* into effect, it is indispensable that the litigation should be about some specific thing, which must necessarily be affected by the termination of the suit. . . . It is further essential to the existence of *lis pendens* that the particular property involved in the suit must be so pointed out by the proceedings as to warn the whole world that they intermeddle at their peril": Freeman on Judgments, secs. 196, 197. The same author says: "*Lis pendens* is notice of all facts apparent on the face of the pleadings, and of those other facts of which the facts so stated necessarily put the purchaser on inquiry": Freeman on Judgments, sec. 198.

In many cases where, in divorce proceedings, the application is for alimony proper, — that is, an allowance to be paid at regular periods for the wife's support, — and especially where there was no statute allowing her any specific part of the husband's estate, it has been held that the rule of *lis pen-*

dens does not apply, because such a suit is *in personam*, and does not apply to any specific part of the personal or real estate of the husband: *Almond v. Almond*, 4 Rand. 662; 15 Am. Dec. 781; *Brightman v. Brightman*, 1 R. I. 112; *Feigley v. Feigley*, 7 Md. 562; 61 Am. Dec. 375. But where the statute permits the husband's estate to be set apart to the wife for life, or, if necessary, in fee, for her support, and in her complaint she specifically describes property which she asks the court to decree to her for her support, there seems to be no well-founded reason why the rule of *lis pendens* should not apply. True, it may be said that the decree of divorce is the first object of the suit, and that support is but an incident. But it is also true that when divorce is sought and granted, and support is required from the husband, the law permits the court, and it is the court's duty, to provide such support as is reasonable and just, under all the circumstances. In such a case, a purchaser *pendente lite*, with notice of the suit and its objects, knows that the property described may be decreed to the wife, and that one of the objects of the suit is to obtain a decree awarding such property to her.

"The primary object for which the suit is brought is not material, provided the court has jurisdiction of the property for secondary purposes; and so it would seem that where a bill for divorce and alimony is filed by the wife against the husband, and there is no special allegation in it pointing out any particular property which is sought to be charged with the payment of the alimony, there will be no *lis pendens* as to either real or personal property of the defendant. Such a case cannot be distinguished from those where the action is professedly *in personam*, and where the contention in the case is entirely independent of any particular property. . . . If, however, the bill should contain special allegations,—should point out particular real or personal property,—and, within the limits of the manifest jurisdiction and powers of the court to grant the relief, should seek to have alimony assigned out of such specific property, there would be constructive notice of the *lis pendens*": Bennett on *Lis Pendens*, sec. 99; see also sec. 219. *Daniel v. Hodges*, 87 N. C. 98, supports the text just quoted. In *Ulrich v. Ulrich*, 2 Mackay, 290, the court followed *Daniel v. Hodges*, 87 N. C. 98, and held that while the rule is, that in a bill for alimony and maintenance there is no *lis pendens* as to the property generally, yet where, as in that case, a certain lot is described in the bill, and it is

alleged that the lot constitutes the principal property of the defendant, out of which alimony should be decreed, there is *lis pendens* as to such property. And see *Draper v. Draper*, 68 Ill. 22; *Vanzant v. Vanzant*, 23 Ill. 548; *Tolerton v. Williard*, 80 Ohio St. 588; *Sapp v. Wightman*, 103 Ill. 158. We are satisfied that the rule of *lis pendens* applies in this case as to the property in question, and it follows that the defendant occupies the attitude of a *pendente lite* purchaser, and is therefore bound by the decree in the divorce case, and by all the proceedings therein that are not *coram non judice*, unless other facts existed which, if proven, would relieve him from the operation of the general rule.

This leads us to an exception taken at the trial to the exclusion of testimony. On cross-examination, plaintiff was asked this question: "During the pendency of the divorce suit between you and Richard Powell, and before the trial of said cause, and before Powell sold the property to Campbell, at the house of George Anderson, in this county, did you not state to Richard Powell words as follows, or to this effect: 'You can sell the ranch if you wish to,' meaning the ranch sold to Campbell. 'I wish to God you would sell it, as it has always been a millstone around our necks'?" It was not claimed that these words, if uttered, were communicated to Campbell, and the court sustained plaintiff's objection to the question. Counsel for appellant say: "The question is not one of estoppel of respondent, but authority in Richard Powell to sell. If the divorce proceeding suspended this authority, respondent's consent revived it." Since there is no element of estoppel in the case, the objection raised is easily disposed of. Powell required no authority from his wife or anybody else to sell. He had the power to sell, and the sale, as between him and Campbell, was valid; but he could not affect her rights by a sale *pendente lite*, at least without a valid release or satisfaction of her claim for support; and neither release nor satisfaction was affected by her statement to Powell, if she made it. Nothing less than a valid contract based upon a sufficient consideration could release the property from the claim already impressed upon it. Suppose, pending the divorce suit, plaintiff had said to Powell, "You may keep the property; I do not want it"; and Powell, without selling the property, had set up that statement in his answer to her claim for support, and had offered evidence showing what she stated. It would hardly be claimed that

such a statement would have deprived her of provision for support, if, at the trial, she had insisted upon her rights. The court did not err in excluding this testimony.

At the close of plaintiff's case in chief, defendant moved the court to require plaintiff to make Richard Powell a party defendant to this action, and that he be brought in as a party defendant, for the reason that the pleadings and proofs showed that a complete determination of the controversy could not be had without his presence. The motion was denied, and it is claimed that the court erred. We do not think so. In the divorce case, the court had jurisdiction of the person of the defendant and the entire subject-matter of the action. He did not answer or defend, but, in a legal sense, he had his day in court. Neither he nor Campbell, in this action, could assail the decree in the divorce case, or any proceeding therein, except for want of jurisdiction. The record before us does not show that in the divorce case the court exceeded its jurisdiction. Powell's rights were determined in that case, and could not be retried in this. Campbell had the same defenses that he and Powell would have had. The decree in the divorce case being in force, we are unable to see that Powell has any interest in this case, or is affected by the decree.

It is further urged that "if the judgment in the divorce suit is valid and binding in so far as it attempts to vest title in respondent, then such title is complete by the terms of the decree, and respondent has a complete remedy at law, and this equitable action cannot be maintained; that a defendant cannot, by a transfer *pendente lite*, defeat the action; the plaintiff may, notwithstanding, proceed to judgment, and eject the assignee."

In support of the statement last made, three cases in ejectment are cited. Undoubtedly, in an action of ejectment, plaintiff prevailing, all persons entering under the defendant, *pendente lite*, may be dispossessed under the judgment: Freeman on Judgments, sec. 171. But we are cited to no authorities holding that this may be done under a decree like that in *Powell v. Powell*, or that Mrs. Powell could have sustained ejectment against Campbell after obtaining her decree against Powell. Campbell had the legal title and possession. She had only an equitable right to both. The original equity doctrine was, that a decree was not, of itself, a legal title, and did not transfer title: 3 Pomeroy's Eq. Jur., sec. 1817. But

in many of the states statutes have been passed providing that a decree shall operate as a conveyance. "When the object of the suit is to compel the conveyance of the legal title by the defendant, and the decree does not require a sale, the title will not pass until the deed is executed, unless it be provided, as has been done in some of the states, by statute, that the decree itself shall operate as a conveyance": *Miller v. Sherry*, 2 Wall. 248.

It is probable that plaintiff might have made Campbell a party to the divorce suit after the conveyance to him from Powell, if she was aware of the sale,—a fact not disclosed by the record. Still, was she not entitled to maintain this action to recover a conveyance, by defendant, of a legal estate corresponding to her equitable title? 1 Pomeroy's Eq. Jur., sec. 152. Such actions have been sustained by the most distinguished courts.

In *Bishop of Winchester v. Paine*, 11 Ves. 199, the court said: "This is not the case of the legal estate acquired during the pendency of the suit, in which instance it might be necessary, in order to avoid it, to have recourse to a new suit." "Although the maxim is, *Pendente lite nil innovetur*, that maxim is not to be understood as warranting the conclusion that the conveyance so made is absolutely null and void, at all times and for all purposes. The true interpretation of the maxim is, that the conveyance does not vary the rights of the parties in that suit, and they are not bound to take notice of the title acquired under it, but, with regard to them, the title is to be taken as if it had never existed." "If, however, the purchaser *pendente lite* be a purchaser of the legal estate, and not of a mere equitable estate, it may, after the determination of the pending suit, be necessary, in order to compel a surrender of his title, or to declare it void, to institute a new suit against him": 2 Story's Eq. Jur., sec. 908, and note 3.

Besides, it is admitted by counsel for appellant that Campbell could have been made a party defendant in the divorce suit, and, if the facts and law warrant it, he could have been made to pass the title to the property in question to plaintiff. The record does not show that plaintiff knew, or had reason to know, of the conveyance from Powell to Campbell, before the trial, or until after it was completed. It is shown by the court's findings that the divorce suit was commenced in March, 1886; that during its pendency, March 25, 1886, Powell conveyed to Campbell. But it nowhere appears that plaintiff

had any knowledge of the conveyance, or of any facts making it incumbent upon her to make inquiries concerning it, until after the trial.

The judgment and order appealed from are affirmed.

MARRIAGE AND DIVORCE—*LIS PENDENS*. — Where a wife files a petition asking for a divorce and alimony, definitely describing therein certain realty owned by the husband, which she seeks to have set aside to her as permanent alimony, the doctrine of *lis pendens* will apply; and a purchaser from the husband will be bound by the judgment subsequently rendered; *Wilkinson v. Elliot*, 43 Kan. 590; *ante*, p. 158, and *note*.

RENO SMELTING WORKS v. STEVENSON.

[20 NEVADA, 289.]

COMMON LAW.—THE WHOLE OF THE COMMON LAW OF ENGLAND IS NOT IN FORCE in this state. The intention of our legislature was to adopt only so much of it as was applicable to our condition. The statutes of the several states adopting the common law are generally construed as applying only in cases where that law is applicable to the habits and conditions of society and in harmony with the genius, spirit, and objects of our institutions. It is contrary to the spirit of the common law itself to apply a rule founded on a particular reason to the law, when the reason utterly fails.

RIPARIAN RIGHTS.—The common-law doctrine of riparian rights is inapplicable to the physical conditions of the Pacific states.

WATER.—THE RIGHT TO WATER IN THIS STATE MUST BE DETERMINED BY THE APPLICATION OF THE PRINCIPLE OF PRIOR APPROPRIATION, and not by the common-law rules respecting riparian rights.

John F. Alexander, attorney-general, Robert H. Lindsay, and Thomas H. Wells, for the appellants.

R. S. Mesick, for the respondent.

BELKNAP, J. This action is brought for the purpose of determining rights to the use of water, upon the following facts: The plaintiff is a corporation engaged in the reduction of ores. It is the owner in fee of ten acres of land on the Truckee River, upon which its reduction-works are situated. Long prior to the commission of the grievances alleged in the complaint, it built a dam in the river at a point above its own land, but with the consent of those whose lands were affected thereby. The water is used to furnish power to operate machinery at the works, and is conveyed from the dam by means of a ditch and flume. The height of the dam is such that the waters of the river flow over it about ten inches above

its crest, and unless the water is maintained at this height, sufficient cannot be diverted to fill the ditch and flume. The state of Nevada is the owner in fee of the land next below that of the plaintiff on the river. The insane asylum of the state is situated thereon, and the defendants, by virtue of their offices of governor, controller, and treasurer of the state, respectively, are commissioners for the care of the insane, and, as such, control the affairs of the asylum. In their capacity as commissioners they have caused the pond of water made by the dam of the plaintiff to be tapped by a flume, and thereby carried a portion of the waters to the asylum grounds for motive power. The district court enjoined this diversion of the waters. Plaintiff, upon this appeal, neither claims nor disclaims a right by virtue of a prior appropriation, but urges an affirmance of the judgment upon the sole ground that it is a riparian proprietor, and, as such, is entitled to the natural flow of the water through its land.

The rights of riparian proprietors are thus stated by Chancellor Kent: "Every proprietor of lands on the banks of a river has naturally an equal right to the use of the water which flows in the stream adjacent to his lands as it was wont to run (*currens solebat*), without diminution or alteration. No proprietor has the right to use the water to the prejudice of other proprietors above or below him, unless he has a prior right to divert it, or a title to some exclusive enjoyment. He has no property in the water itself, but a simple usufruct while it passes along. *Aqua currit et debet currere ut currere solebat*, is the language of the law. Though he may use the water while it runs over his land as an incident to the land, he cannot reasonably detain it, or give it another direction, and he must return it to its ordinary channel when it leaves his estate. Without the consent of the adjoining proprietors, he cannot divert or diminish the quantity of water which would otherwise descend to the proprietors below, nor throw the water back upon the proprietors above, without a grant, or an uninterrupted enjoyment of twenty years, which is evidence of it": 3 Kent's Com. 489. "It is wholly immaterial," says Judge Story in *Tyler v. Wilkinson*, 4 Mason, 400, "whether the party be a proprietor above or below, in the course of the river. The right being common to all the proprietors on the river, no one has a right to diminish the quantity which will, according to the natural current, flow to a proprietor below, or to throw it back upon a proprietor above. This is the

necessary result of the perfect equality of right among all the proprietors of that which is common to all." But the rule of the common law has never been applied by the courts of this state, except as hereinafter mentioned. The condition of settlers upon the public lands of the state necessitated a diversion of running waters from their natural channels for agricultural purposes, and our courts have, with the exception stated, protected the first appropriator to the extent of his appropriation to any beneficial use, and no obligation has been imposed upon him to return the water to its natural channel. The history of this subject is clearly stated by Mr. Justice Field in *Atchison v. Peterson*, 20 Wall. 510, as follows: "By the custom which has obtained among miners in the Pacific states and territories, where mining for the precious metals is had on the public lands of the United States, the first appropriator of mines, whether in placers, veins, or lodes, or of waters in the streams on such lands for mining purposes, is held to have a better right than others to work the mines or use the waters. The first appropriator who subjects the property to use, or takes the necessary steps for that purpose, is regarded, except as against the government, as the source of title in all controversies relating to the property. As respects the use of water for mining purposes, the doctrines of the common law declaratory of the rights of riparian owners were, at an early day, after the discovery of gold, found to be inapplicable, or applicable only in a very limited extent, to the necessities of miners, and inadequate to their protection."

Referring to the rule as above stated, and which accords to the different riparian proprietors an equal right to the use of the waters of the stream, the opinion proceeds: "This equality of right among all the proprietors on the same stream would have been incompatible with any extended diversion of the water by one proprietor, and its conveyance for mining purposes to points from which it could not be restored to the stream. But the government being the sole proprietor of all the public lands, whether bordering on streams or otherwise, there was no occasion for the application of the common-law doctrine of riparian proprietorship with respect to the waters of those streams. The government, by its silent acquiescence, assented to the general occupation of the public lands for mining, and, to encourage their free and unlimited use for that purpose, reserved such lands as were mineral, from sale, and the acquisition of title by settlement. And he who first

connects his own labor with property thus situated, and open to general exploration, does, in natural justice, acquire a better right to its use and enjoyment than others who have not given such labor. So the miners on the public lands throughout the Pacific states and territories, by their customs, usages, and regulations, everywhere recognized the inherent justice of this principle, and the principle itself was at an early period recognized by legislation, and enforced by the courts in those states and territories." And in *Bacey v. Gallagher*, 20 Wall. 670, after referring to the views above quoted, the court say: "The views there expressed, and the rulings made, are equally applicable to the use of waters on the public lands for purposes of irrigation. No distinction is made in those states or territories by the customs of miners or settlers, or by the courts, in the rights of the first appropriator from the use made of the water, if the use be a beneficial one." In the case of *Vansickle v. Haines*, 7 Nev. 249, it was held that the patentee of the government succeeded to all its rights, and among these was the right to have the water of a stream theretofore diverted returned to its natural channel. In that case the patent of the government had been issued prior to the passage of the act of Congress of July 26, 1866. The court considered the statute prospective in its nature, and that it did not apply to that patent. Subsequently, in the case of *Broder v. Natoma Water etc. Co.*, 101 U. S. 274, the supreme court of the United States declared that the statute was rather a voluntary recognition of a pre-existing right of possession, constituting a valid claim to its continued use, than the establishment of a new one; and, following this view, the construction given to the statute in *Vansickle v. Haines*, 7 Nev. 249, was overruled in *Jones v. Adams*, 19 Nev. 78; 8 Am. St. Rep. 788. Again, in *Vansickle v. Haines*, 7 Nev. 249, the court considered the language of the statute adopting the common law precluded a consideration of the question of its applicability. The statute is as follows: "The common law of England, so far as it is not repugnant to or in conflict with the constitution and laws of the United States, or the constitution and laws of this state, shall be the rule of decision in all the courts of this state": Gen. Stats. 3021. This was substantially the statute when *Vansickle v. Haines*, 7 Nev. 249, was decided. The statute is silent upon the subject of the applicability of the common law, but we think the term "common law of England" was employed in the sense in which it is generally understood

in this country, and that the intention of the legislature was to adopt only so much of it as was applicable to our condition. An examination of the authorities will render this apparent.

In Curtis's Commentaries, section 16, the author says: "It is to be observed that the common law of England was adopted by the founders of the American colonies to a limited extent only. The emigrants from England brought with them the general principles of the common law of that country, and adopted and put them in practice, so far as they were applicable to their situation; and as the people of each colony acted independently of the rest in this respect, it has resulted that the common law of each of the states differs in some particulars from that of the others, and that in none of them is it wholly identical with the common law of England." Professor Washburn, in his treatise upon the law of real property (vol. 1, 36), says: "It may be well to understand how far the common and statute law of England have been adopted as the law of this country. As a general proposition, so much of these as was suited to the condition of a people like that of the early settlers of this country was adopted by common consent as the original common law of the colonies. They brought it with them as they did their language, and regarded it as a heritage of inestimable value, by which their rights of person and property were to be regulated and secured. Especially was this true in regard to the law of real property." "The common law of England," said Judge Story, "is not to be taken in all respects to be that of America. Our ancestors brought with them its general principles, and claimed it as their birthright, but they brought with them, and adopted, only that portion which was applicable to their situation": *Van Ness v. Pacard*, 2 Pet. 144. "The common law," says Chancellor Kent, "so far as it is applicable to our situation and government, has been recognized and adopted as one entire system by the constitutions of Massachusetts, New York, New Jersey, and Maryland. It has been assumed by the courts of justice, or declared by statute, with the like modifications, as the law of the land in every state. It was imported by our colonial ancestors as far as it was applicable: 1 Kent's Com. 473.

In *Bogardus v. Trinity Church*, 4 Paige, 198, the question was, whether the statute of 32 Henry VIII., and that of 21 James I., constituted a part of the law of the state of New York. Chancellor Walworth said: "It is a natural presump-

tion, and therefore adopted as a rule of law, that, on the settlement of a new territory by a colony from another country, especially where the colonists continue subject to the same government, that they carry with them the general laws of the mother country which are applicable to the situation of the colonists in the new territory; which laws thus become the laws of the colony until they are altered by the common consent or by legislative enactment. . . . The common law of the mother country, as modified by positive enactments, together with the statute laws which are in force at the time of the emigration of the colonists, become in fact the common law rather than the common and statute law of the colony. The statute law of the mother country, therefore, when introduced into the colony of New York, by common consent, because it was applicable to the colonists in their new situation, and not by legislative enactment, became a part of the common law of this province." And the rules of the common law are not enforced in localities to which they are inapplicable. In Illinois it was held that the rule of the common law requiring the owner of cattle to keep them upon his own land was inapplicable. The court said: "However well adapted the rule of the common law may be to a densely populated country like England, it is surely but ill adapted to a new country like ours. If this common-law rule prevails now, it must have prevailed from the time of the earliest settlements in the state; and can it be supposed that when the early settlers of this country located upon the borders of our extensive prairies they brought with them and adopted as applicable to their condition a rule of law requiring each one to fence up his cattle? that they designed the millions of fertile acres stretched out before them to go ungrazed, except as each purchaser from government was able to inclose his part with a fence? This state is unlike any other of the eastern states in their early settlement, because, from the scarcity of timber, it must be many years yet before our extensive prairies can be fenced; and their luxuriant growth, sufficient for thousands of cattle, must be suffered to rot and decay where it grows, unless the settlers upon their borders are permitted to turn their cattle upon them. Perhaps there is no principle of the common law so inapplicable to the condition of our country and people as the one which is sought to be enforced now, for the first time since the settlement of the state. It has been the custom in Illinois, so long that the memory of man runneth not to the

contrary, for the owners of stock to suffer them to run at large. Settlers have located themselves contiguous to prairies for the very purpose of getting the benefit of the range. The right of all to pasture their cattle upon uninclosed ground is universally conceded. No man has questioned this right, although hundreds of cases must have occurred where the owners of cattle have escaped the payment of damages on account of the insufficiency of the fences through which their stock have broken, and never till now has the common-law rule that the owner of cattle is bound to fence them up been supposed to prevail or to be applicable to our condition. The universal understanding of all classes of the community, upon which they have acted by inclosing their crops and letting their cattle run at large, is entitled to no little consideration in determining what the law is; and we should feel inclined to hold, independent of any statutes upon the subject, on account of the inapplicability of the common-law rule to the condition and circumstances of our people, that it does not, and never has, prevailed in Illinois": *Seeley v. Peters*, 5 Gill, 142.

When that case was decided, a statute of the state was in force adopting the common law "so far as the same is applicable and of general nature." No mention of this qualification is made in the opinion. The court appears to have assumed its existence independently of express enactment, because in the year 1841, before the legislature had annexed the qualification to the statute, the court, in *Boyer v. Sweet*, 3 Scam. 120, said: "It is true, we have, like most other states in the Union, adopted the common law by legislative act; but it must be understood only in cases where that law is applicable to the habits and conditions of our society, and in harmony with the genius, spirit, and objects of our institutions."

In the case of *People v. Canal Appraisers*, 33 N. Y. 461, the question was, whether the common-law rule of evidence to determine whether streams are navigable was applicable in the state of New York. In discussing the subject, the court adopted the views expressed by Judge Bronson in a dissenting opinion in *Starr v. Child*, 20 Wend. 149, as follows: "By the common law, the flow and reflow of the tide is the criterion for determining what rivers are public. This rule is open to the double objection that it includes some streams which are not in fact navigable, and which, consequently, might well be the subject of individual ownership; and it excludes other streams, which are in fact navigable, and which in every well-

regulated state should belong to the public. Although the ebb and flow of the tide furnishes an imperfect standard for determining what rivers are navigable, it nevertheless approximates the truth, and may answer very well in the island of Great Britain, for which the rule was made. But such a standard is quite wide of the mark when applied to the great fresh-water rivers of this continent, and would never have been thought of here, if we had not found the rule ready made at our hands. Now, I think no doctrine better settled than that such portions of the law of England as are not adapted to our condition form no part of the law of this state. This exception includes not only such laws as are inconsistent with the spirit of our institutions, but such as were framed with special reference to the physical condition of a country differing widely from our own. It is contrary to the spirit of the common law itself, to apply a rule founded on a particular reason, to a law, when that reason utterly fails, — *Cessante ratione legis, cessat ipsa lex.*" In states where the common law has not been adopted by legislative enactment, courts have proceeded upon the hypothesis of its adoption, subject, always, to its applicability to the locality: *Stout v. Keyes*, 2 Doug. (Mich.) 184; 43 Am. Dec. 465; *Lorman v. Benson*, 8 Mich. 18; 77 Am. Dec. 435; *Morris v. Vanderen*, 1 Dall. 67; Report of Judges, 8 Binn. 595; *Shewel v. Fell*, 3 Yeates, 21; *Flanagan v. Philadelphia*, 42 Pa. St. 219; *State v. Cawood*, 2 Stew. 360; *Inge v. Murphy*, 10 Ala. 885.

From these authorities we assume that the applicability of the common-law rule to the physical characteristics of the state should be considered. Its inapplicability to the Pacific states, as shown in *Atchison v. Peterson*, 20 Wall. 510, applies forcibly to the state of Nevada. Here the soil is arid, and unfit for cultivation unless irrigated by the waters of running streams. The general surface of the state is table-land, traversed by parallel mountain ranges. The great plains of the state afford natural advantages for conducting water, and lands otherwise waste and valueless become productive by artificial irrigation. The condition of the country, and the necessities of the situation, impel settlers upon the public lands to resort to the diversion and use of waters. This fact of itself is a striking illustration and conclusive evidence of the inapplicability of the common-law rule. The system which the necessities of the people established was recognized and confirmed by the legislation of Congress, — 1. By the act

of July 28, 1866, which declares, in its ninth section, "that whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same"; and 2. By the desert-land act, which encourages the appropriation and use of water upon such of the public lands as will not, without irrigation, produce an agricultural crop, by authorizing the sale of a greater amount of such land than the purchaser could otherwise acquire, upon proof of his having conducted water upon it for the purpose of irrigation. This act applies only to the Pacific coast states and territories: U. S. Stats. 1877, 377. The legislation of the state, also, has encouraged the diversion of water by an act approved March 3, 1866, the general object of which is expressed in its title, as follows: "An act to allow any person or persons to divert the waters of any river or stream, and run the same through any ditch or flume, and to provide for the right of way through the lands of others": Gen. Stats. 362-365. And the adjudications of the courts, with the exception mentioned, have sustained the doctrine of appropriation upon which the people acted.

That the doctrine should be upheld, as well after the issuance of the patent of the government as before, we quote the views of Mr. Justice Ross in a dissenting opinion in *Luz v. Haggin*, 69 Cal. 450: "The doctrine of appropriation thus established was not a temporary thing, to exist only until some one should obtain a certificate or patent for forty acres, or some other subdivision of the public land bordering on the river or other stream of water. It was, as has been said, born of the necessities of the country and its people, was the growth of years, permanent in its character, and fixed the *status* of water rights with respect to public lands. No valid reason exists why the government, which owned both the land and the water, could not do this. It thus became, in my judgment, as much a part of the law of the land as if it had been written in terms in the statute-books, and in connection with which all grants of public land from either government should be read. In the light of the history of the state, and of the legislation and decisions with respect to the subject in question, is it possible that either government, state or national, ever contemplated that conveyance of forty acres

of land at the lower end of the stream that flows for miles through public lands should put an end to subsequent appropriation of the waters of the stream upon the public lands above, and entitle the grantee of the forty acres to the undiminished flow of the water in its natural channel from its source to its mouth? It seems to me entirely clear that nothing of the kind was ever intended or contemplated." The case of *Coffin v. Left Hand Ditch Co.*, 6 Col. 443, recognizes appropriation as the law of the state of Colorado. Some of the principles announced in that case are applicable here. "It is contended by counsel for appellants," say the court, "that the common-law principles of riparian proprietorship prevailed in Colorado until 1876, and that the doctrine of priority of right to water by priority of appropriation thereof was first recognized and adopted in the constitution. But we think the latter doctrine has existed from the date of the earliest appropriations of water within the boundaries of the state. The climate is dry, and the soil, when moistened only by the usual rainfall, is arid and unproductive. Except in a few favored sections, artificial irrigation, for agriculture, is an absolute necessity. Water in the various streams thus acquires a value unknown in moister climates. Instead of being a mere incident to the soil, it arises, when appropriated, to the dignity of a distinct usufructuary estate or right of property. It has always been the policy of the national as well as the territorial and state governments to encourage the diversion and use of water in this country for agriculture and vast expenditures of time and money have been made in reclaiming and fertilizing, by irrigation, portions of our unproductive territory. . . . The right to water in this country, by priority of appropriation thereof, we think it is, and has always been, the duty of the national and state governments to protect. The right itself, and the obligation to protect it, existed prior to legislation on the subject of irrigation. It is entitled to protection, as well after patent, to a third party, of the land over which the natural stream flows, as when such land is a part of the public domain, and it is immaterial whether or not it be mentioned in the patent, and expressly excluded from the grant." Our conclusion is, that the common-law doctrine of riparian rights is unsuited to the condition of our state, and that this case should have been determined by the application of the principles of prior appropriation.

Judgment reversed, and cause remanded for a new trial.

COMMON LAW. — Only so much of the common law as is applicable to our circumstances and customs is recognized as part of our common law: *Pennock's Estate*, 20 Pa. St. 268; 59 Am. Dec. 718, and note.

WATER RIGHTS — PACIFIC STATES. — The common-law doctrine giving the riparian owner a right to the flow of a stream in its natural channel over his lands, although he makes no beneficial use thereof, is inapplicable to the Pacific Coast states; in those states, the first appropriator of the water for a useful purpose has a prior right thereto: *Jones v. Adams*, 19 Nev. 78; 3 Am. St. Rep. 788, and note; *Hammond v. Rose*, 11 Col. 524; 7 Am. St. Rep. 258; *Lakeside Ditch Co. v. Crane*, 80 Cal. 182; *South etc. Water Co. v. Rosa*, 80 Cal. 334; *De Necochea v. Curtis*, 80 Cal. 397; *Platte W. Co. v. North Col. I. Co.*, 12 Col. 525; *Farmers' etc. Co. v. Southworth*, 13 Col. 112; *Van Bibber v. Hilton*, 84 Cal. 585. But to make any diversion of water from its natural course an appropriation, the water must be used for a beneficial purpose. Irrigation is such a use: *Farmers' etc. Co. v. Southworth*, 13 Col. 111; *Peregoy v. McKiesick*, 79 Cal. 572.

STATE v. TUFLY.

[20 NEVADA, 427.]

UNCONSTITUTIONAL STATUTE IS ABSOLUTELY NULL AND VOID. It is a misnomer to call it a law; it is to be regarded as never having been possessed of any legal force or effect; and the subsequent adoption of an amendment to the constitution authorizing the enactment of such a statute cannot give it validity.

RETROSPECTIVE LAW. — Amendment to the constitution of a state, authorizing its legislature to enact a particular law, cannot impart validity to a law of the same character previously enacted, but which, when so enacted, was unconstitutional and void.

S. Summerfield, for the relators.

J. D. Torreyson, for the respondent.

HAWLEY, C. J. Application by relators, constituting the board of education, for *mandamus* to compel respondent, as state treasurer, to invest the sum of fifty thousand dollars of the state irreducible school fund in interest-bearing bonds of other states, pursuant to the provisions of an amendatory act providing for the safe-keeping of the securities of the state school fund, "approved January 18, 1887": Stats. 1887, 17.

The application must be denied, because there is no law authorizing such an investment to be made. The amendatory act upon which the application is based was passed under the belief that a proposed amendment to the constitution, authorizing such investment, had been legally adopted; but owing to certain omissions of the legislature to make the necessary entries upon the journals of the respective houses, as required

by the constitution, this court, in *State v. Tuflly*, 19 Nev. 391, 3 Am. St. Rep. 895, decided that "the amendment was not constitutionally adopted," and that "the statute enacted for the purpose of executing its provisions is unconstitutional." There is, therefore, no law upon which this application is based. An act of the legislature which is not authorized by the state constitution at the time of its passage is absolutely null and void. It is a misnomer to call such an act a law. It has no binding authority, no vitality, no existence. It is as if it had never been enacted, and it is to be regarded as never having been possessed of any legal force or effect: *Meagher v. County of Storey*, 5 Nev. 251; *State v. Rogers*, 10 Nev. 250; 21 Am. Rep. 738; Cooley's Constitutional Limitations, 227. The act being void, no subsequent adoption of an amendment to the constitution, authorizing the legislature to provide for such investment, would have the effect to infuse life into a thing that never had any existence; and as the legislature failed to enact any law authorizing the investment of the school fund in the bonds of other states, after the vote was taken upon the constitutional amendment at the special election held February 11, 1889, there is nothing before us which requires or authorizes us to express any opinion upon the validity of that amendment. The only statute which authorizes any investment of the money in the school fund is that approved February 21, 1871, the fourth section of which was attempted to be amended by the unconstitutional act of 1887, and no investment of said fund can be made in any other manner than is provided for in that act: Stats. 1871, 66; Gen. Stats. 1868. *Mandamus* denied.

UNCONSTITUTIONAL STATUTE. — A statute adjudged to be unconstitutional is as if it had never been: Note to *Kelly v. Bemis*, 62 Am. Dec. 51. For unconstitutional statutes are absolutely void: *Berghaus v. Harrisburg*, 122 Pa. St. 289; *Shoemaker v. Harrisburg*, 122 Pa. St. 285; and acts done thereunder are unauthorized and void: *Bragg v. Tufts*, 49 Ark. 554. But an unconstitutional provision or section in a statute will not vitiate the other provisions or sections therein unless they are inseparably connected with it: *Mathias v. Cramer*, 73 Mich. 5; *Turner v. Fish*, 19 Nev. 295.

RETROSPECTIVE LAWS. — Provisions in a constitution, like provisions in legislative acts (*Jimison v. Adams County*, 130 Ill. 558; *Maxwell v. Commissioners*, 119 Ind. 20; *Phillips v. Township of New Buffalo*, 68 Mich. 217), must operate prospectively, not retrospectively: *Pecot v. Police Jury*, 41 La. Ann. 708.

CASES

IN THE

COURT OF CHANCERY

OF

NEW JERSEY.

BRITTON v. SUPREME COUNCIL OF THE ROYAL ARCANUM.

[46 NEW JERSEY EQUITY, 102.]

CORPORATIONS — BENEFIT ASSOCIATIONS — WHO MAY BE MADE BENEFICIARIES. — If a corporation is organized under a statute authorizing the formation of corporations to accumulate a fund to be paid to the widows and children of deceased members, the corporation can pay the fund to such persons only, and an agreement on the part of such corporation or its member to pay a part of such fund to any other person is *ultra vires* and void.

CORPORATIONS — BENEFIT ASSOCIATION — REPRESENTATIONS NOT AFFECTING BENEFICIARY. — Where an applicant for membership in a corporation formed to accumulate a fund for the benefit of the widows and children of deceased members makes a false representation as to his relationship to the named beneficiary, this does not constitute a warranty so as to preclude his real beneficiary from recovering on the contract.

FRAUD OR FALSEHOOD NOT RESULTING IN LEGAL INJURY can neither be made the foundation of an action nor the ground of a defense.

CORPORATIONS — BENEFIT ASSOCIATION — BENEFICIARIES. — Where the beneficiaries of a corporation are prescribed by law, it is an evasion of its policy and a violation of its charter to say that where a member has named a person not within the class to be benefited, and the corporation has issued the certificate to such person, such acts shall deprive the proper person or class of persons of all right or interest in the fund.

CORPORATIONS — BENEFIT ASSOCIATION — "LEGAL HEIRS." — Where the by-laws of a corporation formed to accumulate a fund for the benefit of the widows and children of deceased members direct that in case a member shall have made no disposition of the benefit payable on his death, it shall be paid to his legal heirs dependent on him, the term "legal heirs" will include his next of kin dependent upon him at the time of his death.

EQUITY — REMEDY. — Where there is a civil wrong without a remedy at law, equity will take jurisdiction, in order that what is right may be done.

Charles H. Voerkis, for the complainant.

William Brinkerhoff, for the defendant corporation.

VAN FLEET, V. C. The complainant brings this suit to compel the Supreme Council of the Royal Arcanum to pay her the sum of three thousand dollars, which she alleges she became entitled to by the death of her son, Merritt C. W. C. Britton, under a contract made by her son with the defendant. Her son was a member of the defendant corporation at the time of his death. He was admitted as a full-rate member on the thirteenth day of February, 1884, and died on the second day of May, 1886. He died childless, never having been married, and his nearest kindred at the time of his death were the complainant and two brothers. The defendant is a corporation organized under statutes of Massachusetts authorizing the formation of corporations to raise a fund "for the purpose of assisting widows, orphans, or other relatives of deceased members, or persons dependent upon deceased members." By a statute passed in 1877, the persons to whom the accumulated fund of such a corporation could be dispensed or paid were limited to "widows, orphans, or other persons dependent on deceased members." But a statute passed in 1882 enlarged the class of persons who might become the beneficiaries of the fund accumulated by such a corporation so as to embrace "widows, orphans, or other relatives of deceased members, or persons dependent upon deceased members": *American Legion of Honor v. Perry*, 140 Mass. 580.

The contract on which the complainant rests her right to relief is to be found in the application for membership made by her son, the certificate of membership issued to him, and the constitution and by-laws of the defendant corporation. One of the principal objects of the defendant corporation, as its constitution declares, is to establish a widows' and orphans' benefit fund, from which, on satisfactory evidence of the death of a member of the order who has complied with all its lawful requirements, a sum not exceeding three thousand dollars shall be paid to his family, or those dependent on him, as he may direct. One of its by-laws ordains that there shall be paid, on the death of each full-rate member who is in good standing and not under suspension for any cause at the time of his death, the sum of three thousand dollars. This payment is to be made by a draft drawn by the secretary on the treasurer, in favor of the person entitled to the benefit, and

delivered to the payee, who must, when he presents his draft to the treasurer for payment, surrender the outstanding benefit certificate. Another by-law provides that each applicant for membership shall enter on his application for membership the name of the person to whom he desires his benefit paid on his death, and that the name of the beneficiary so designated shall be entered in the certificate issued to the member. Members have the right to change their beneficiary on surrendering the benefit certificate previously issued, and to have a new certificate issued in the name of the new beneficiary. By another by-law, it is ordained that "in the event of the death of all the beneficiaries designated by the member in accordance with the laws of the order, before the decease of such member, if he shall have made no other or further disposition thereof, the benefit shall be paid to the legal heirs of the deceased member dependent upon him; and if no person or persons shall be entitled to receive such benefit, by the laws of this order, it shall revert to the widows' and orphans' benefit fund."

By the constitution and by-laws, no person is qualified to become a member of the defendant corporation unless he is a "white man between twenty-one and fifty-five years of age, of sound health, of good moral character, a believer in a Supreme Being, and competent to earn a livelihood for himself and family."

The foregoing summary states, in substance, all of the provisions of the constitution and by-laws pertinent to the present discussion.

In his application for membership, Merritt C. W. C. Britton designated Robert M. Brennan as the person to whom he desired his benefit to be paid on his death, and in the certificate which the defendant issued to Britton, Brennan was named as beneficiary, and Britton, after obtaining the certificate, delivered it to Brennan, who still retains it, and who has, on demand, refused to surrender it. Brennan was not related to Britton, nor was he in any wise dependent on Britton. The proofs show that Brennan was a creditor of Britton, and that the reason why Britton appointed him his beneficiary and delivered his certificate to him was to secure him for a debt. Brennan can take nothing under this appointment. Britton's attempt to make Brennan his beneficiary must be treated as nugatory. In another case involving the same question, I have said, in conformity to what I understand to be the uni-

form course of decision on this subject, that where a corporation is organized under a statute authorizing the formation of corporations to accumulate a fund to be paid to the widows and children of deceased members, the corporation can only pay the fund to the widows and children of deceased members; and if it should make a promise to pay any part of it to any other person, its promise would be void. Its promise would not only be *ultra vires*, but in direct contravention of the purpose of the statute from which it derived both its corporate existence and power. And a member of such a corporation is equally powerless to divert from its appointed channel that part of the fund of the corporation which becomes payable on his death: *American Legion of Honor v. Smith*, 45 N. J. Eq. 466. So that I think it must be regarded as entirely clear that Brennan has no right whatever to the sum in controversy, nor to the certificate of membership issued to Britton.

The question of the case is, Did the complainant, by the death of her son, become entitled to the sum which she claims? The defendant says she did not, because her son procured his certificate of membership by deceit and fraud, and it has, in addition to answering, filed a cross-bill asking for the surrender and cancellation of the certificate. The fraud charged consists in a representation in his application for membership that Brennan was his cousin, when in truth no relationship existed between them. The following are the material parts of Britton's application: "I am not now a member of this order; I have not within six months been rejected; am not now under suspension, and have never been expelled from any council of this order; and am a believer in a Supreme Being. I reside at 305 York Street, Jersey City. I was born on the seventh day of August, 1851, and am between thirty-two and thirty-three years of age. My occupation is that of a medical student; place of business, college of P. and S., New York City. I direct that, in case of my death, all benefit to which I may be entitled from the Royal Arcanum be paid to Robert M. Brennan, Hopewell, Mercer County, New Jersey, related to me as cousin, subject to such future disposal of the benefit among my dependents as I may hereafter direct, in compliance with the laws of the order. I am temperate in my habits, and have no injury or disease which will tend to shorten my life; am now in good health, and able to gain a livelihood. I do hereby consent and agree that any untrue or fraudulent statement made above, or to the medical examiner, or any conceal-

ment of facts by me in this application, or any suspension or expulsion from, or voluntarily severing my connection with, the order, shall forfeit the rights of myself and my family, or dependents, to all benefits and privileges therein."

The only one of the foregoing statements which it is asserted was either untrue or fraudulent is the one in which it is stated that Brennan was related to Britton as cousin. But conceding, as it must be, that that statement was untrue, and that it was made knowing it to be untrue, the question which this condition of facts raises is this: Did that statement have the least effect in influencing or inducing the defendant into doing something to its harm or injury which it would not have done if no such statement had been made? It is clear, I think, that it cannot be considered a warranty. There is nothing in the constitution or by-laws which would warrant the court in so construing it. It has been held, where an applicant for admission to membership in a similar corporation made representations concerning the condition of his health, which were untrue, but which he supposed to be true when he made them, that they did not constitute warranties, nor preclude his beneficiary from recovering on the contract: *Illinois Masons Beneficial Society v. Winthrop*, 85 Ill. 537.

The only possible misleading effect which the statement in question could have had was to produce the belief that Brennan was qualified to become Britton's beneficiary, when in fact he was not. But of this, it appears, the defendant's officers were informed by other statements contained in Britton's application. When Britton was admitted to membership, the defendant's benefit fund could only be paid to the family of a deceased member, or those dependent on him. So its constitution expressly declared. The word "family," as used in this part of the constitution, was manifestly used as the synonym of widow and children. To give it broader meaning would put this provision of the constitution in conflict with the statute under which the defendant was organized, and thus render this part of the constitution invalid. That should not be done if a construction can be fairly adopted which will bring the constitution in harmony with the statute. After the statute of 1882 took effect, the defendant had authority to establish a fund for the benefit of other persons than the widows and orphans of deceased members, and persons dependent on deceased members,—it might have established a fund, not only for the benefit of the widows and orphans of deceased

members, and persons dependent on deceased members, but also for the benefit of the relatives of deceased members other than widows and orphans,—but, so far as appears, it never attempted to exercise such additional power. Until it shall have put in exercise such additional power, and established a fund for the benefit of other relatives of deceased members than widows and orphans, no person who is not in position to claim as the widow or child of a deceased member can successfully assert a right to any part of its benefit fund: *American Legion of Honor v. Perry*, 140 Mass. 580, 592.

Britton's application stated that he resided at Jersey City, and that Brennan resided at Hopewell, Mercer County, so that the application gave the defendant's officers notice, on its face, that Brennan was not a member of Britton's family, but that they resided at different places, a long distance apart. The application did not represent that Brennan was dependent on Britton; it said nothing on that subject; all it said was, that he was Britton's cousin, but this did not qualify him to become Britton's beneficiary. He could not be Britton's beneficiary except he was dependent on him. And just in this connection it is proper to state that it appeared from Britton's examination before the defendant's medical examiner, which was annexed to his application, and formed part of it, that he had three relatives nearer in blood than a cousin, namely, a mother and two brothers. Britton was not required, either by the defendant's constitution or its by-laws, to make any representation showing that the person he selected was competent to become his beneficiary. He made none in fact. His statement that Brennan was his cousin shows, or tends to show, that Brennan was qualified to become his beneficiary; but that statement, when considered in connection with others made at the same time, made it entirely plain that he was not. The question whether Brennan possessed the qualifications necessary to enable him to become Britton's beneficiary or not was so entirely aside from the question whether Britton should be admitted to membership or not, that it is almost certain that, during the time the last question was under consideration, the first never suggested itself to the mind of Britton, nor to the minds of the officers with whom he dealt. Whether the person designated by a member, on his admission, as his beneficiary, is qualified or not is a question which is wholly unimportant and immaterial to the defendant. The designation then made will only continue in force so long as

the member chooses to let it stand. He has a right to change his beneficiary as often as his will changes. The only limitation upon his power in that regard is, that he cannot make a designation which will divert that part of the fund payable on his death from its appointed channel. And whether he designates a qualified or incompetent person can have no effect whatever in either increasing or diminishing the defendant's liability. The sum which it must pay on the death of a member is fixed by its contract, as well as the person or persons to whom it must be paid. In no case can the defendant be required to pay until the certificate issued by it has been surrendered or declared invalid. Britton undoubtedly told a falsehood when he said Brennan was his cousin, but his falsehood did the defendant no harm. A falsehood or fraud that does not result in legal injury can neither be made the foundation of an action nor the ground of a defense.

Nothing has been shown which entitles the defendant to the surrender of its certificate on the ground that it was fraudulently obtained, and its cross-bill must therefore be dismissed, with costs to the complainant.

Another defense is set up. The defendant insists that by the terms of its contract it is under no duty to recognize any person as the beneficiary of a deceased member except the one designated by him, and that if the person whom he has designated happens to be disqualified, it is not liable to anybody, but that, in such a state of circumstances, the sum which would have been payable on the death of the member to his beneficiary, had he designated a person competent to take, lapses and sinks into the widows' and orphans' benefit fund. This defense is based on that provision of the constitution which declares that one of the objects of the defendant is to establish a widows' and orphans' benefit fund, from which, on the death of a member, there shall be paid a certain sum to his family, or those dependent on him, as he may direct. The argument is, that as the contract says that that part of the fund payable on the death of a member shall be paid as he may have directed, it necessarily follows that if a member dies without having exercised his right of direction, or if he has given a direction which he had no authority to give, nothing can be paid. The claim is, that the right of a beneficiary to take depends on the fact that the power of appointment vested in a member has been exercised in his favor, and that if he cannot show such an appointment, he is without right.

But this view manifestly overlooks another very material part of the contract. One of the defendant's by-laws, it will be remembered, ordains, in substance, that if the beneficiary appointed by a member dies in the lifetime of the member, and the member shall subsequently make no other or further disposition of that part of the benefit fund payable on his death, it shall, on his death, be paid to his legal heirs dependent on him; and that if there be no person entitled to receive it, according to the laws of the order it shall revert to the widows' and orphans' benefit fund. If we look, then, at the whole contract, and construe it in the light of all of its provisions, it would seem to be clear that there can be no lapse or reverter, except a member dies without leaving an heir dependent on him.

This is the construction which similar contracts have already received. In the case of the *American Legion of Honor v. Perry*, 140 Mass. 589, the supreme court of Massachusetts said: "The statute under which the plaintiff corporation is organized [the defendant in this case is organized under the same statute] gives it authority to provide for the widows, orphans, or other dependents upon deceased members, and further provides that such fund shall not be liable to attachment. The classes of persons to be benefited are designated, and the corporation has no authority to create a fund for other persons than of the classes named. The corporation has power to raise a fund payable to one of the classes named in the statute, to set it apart to await the death of the member, and then to pay it over to the person or persons of the class named in the statute, selected and appointed by the member during his life; and if no one is so selected, it is still payable to one of the classes named." The appellate court of the first district of Illinois, in enforcing a contract made by the defendant in this case, containing substantially the same terms found in the contract now in suit, said, after adopting the view which has just been quoted from the opinion in *American Legion of Honor v. Perry*, 140 Mass. 589, that where the beneficiaries are prescribed by law, it is an evasion of its policy and a violation of its letter to say that where a member has named a person not within the class to be benefited, and the corporation has issued the certificate to such person, such acts shall deprive the proper person or class of persons of all right to or interest in the fund: *Parks v. Welch*, Ill. App. Ct. Rep. These decisions settle the construction which should

be given to that part of the contract which is put in contest in this case, and they settle it in strict accord with the purpose which the legislature had in view in authorizing the formation of such corporations as the defendant. The legislative purpose is clear. It was to provide a way by which men of small means might combine together to accumulate a fund for the benefit of those who should, as each dropped out by death, be dependent on him for food, raiment, and shelter, and from which his dependents should, on his death, receive a certain fixed sum.

So it would seem to be entirely clear that the complainant's case falls directly within both the terms of the contract on which her action is founded and the purpose of the statute from which the defendant derives its corporate life and power. She is one of the next of kin of the deceased member of the defendant corporation. She is also his heir by force of our statute regulating descents, but not according to the canons of the common law: *Taylor v. Bray*, 32 N. J. L. 182; 36 N. J. L. 415. But the phrase "legal heirs," as used in the defendant's by-laws, directing that in case a member shall have made no disposition of the benefit payable on his death, his benefit shall, on his death, be paid to his legal heirs dependent on him, is obviously used as the equivalent of next of kin, or perhaps in a still broader sense, meaning dependents as well as next of kin. That it is used in a sense broader than that which its words, understood in a technical sense, import is placed beyond doubt when it is remembered that the fund from which the benefit is payable was established for the benefit of the widows and orphans of deceased members, and persons dependent on deceased members. If, in this case, the deceased member had left no person who would have been entitled to succeed to his land as heir, but had left a widow, I do not think it could have been successfully contended that that part of the benefit fund payable on his death had lapsed because his widow was not his heir, and could not, therefore, take it. It would be impossible for any court so to adjudge without first declaring, as a matter of law, that it was within the power of a corporation organized to establish a fund for the benefit of the widows of its deceased members, so to frame its by-laws as to cut off the rights of the very class of persons for whose benefit it was organized, and thus defeat the fundamental object of its organization. The complainant was not only one of the next of kin of a deceased member, but his

dependent. She was the only person who was dependent on him at the time of his death. He left neither widow nor child, and the only dependent on him at the time of his death, or to whose support he contributed during his life, was the complainant. The proofs on this part of the case are full and free from dispute. The complainant's right, therefore, to the fund for which she sues is, in my judgment, clear.

Has this court power to enforce the complainant's right? She has no remedy at law. The defendant made no promise to her. Brennan holds Britton's certificate of membership, and refuses to surrender it. According to the terms of the contract, the defendant is not required to pay until this certificate is surrendered. This provision of its by-laws is reasonable and necessary. It was adopted to prevent the loss or waste of any part of its benefit fund in litigation in resisting illegal claims. The complainant, to put herself in a position where she will be entitled to the payment of the money in question, must first procure a judicial sentence, either compelling, or declaring it worthless in his hands. Such a sentence can only be pronounced by a court of equity. The case comes, therefore, directly within the regulation of judicial power which declares that where there is a civil wrong there ought to be a remedy, and if the law gives none, equity shall take jurisdiction, in order that what is right may be done. The complainant is not entitled to interest. The money she is seeking to recover is not payable until Britton's certificate of membership has been surrendered. The defendant has offered to pay on the surrender of the certificate, but Brennan, by refusing to surrender it, has kept affairs in such a condition that the defendant could not pay with safety. No claim for the interest which has been lost by Brennan's conduct is made against him by the bill, and the question, therefore, whether he is liable for it or not, is not in the case.

The complainant is entitled to a decree declaring that that part of the certificate issued to Britton which promises that payment shall be made to Brennan is void, and directing Brennan forthwith to surrender the certificate for cancellation; and also declaring that the complainant is entitled to the three thousand dollars which became payable on her son's death, and directing that the defendant corporation shall, within ten days after service of a copy of the decree, pay that sum to the complainant. The decree will be made without

costs as against the defendant corporation, but with costs as against Brennan.

MUTUAL BENEFIT ASSOCIATIONS. — THE BENEFICIARIES MAY BE CHANGED in a certificate of membership in a mutual benefit society, if this is not expressly forbidden by the rules of the society; but the change must be made in the manner designated by the rules, if any exist, upon the subject: Note to *Union Mut. Ass'n v. Montgomery*, 14 Am. St. Rep. 527. See also *Bankers' etc. Mut. Ben. Ass'n v. Stapp*, 77 Tex. 517; 20 Am. St. Rep. extended note.

LIFE INSURANCE — REPRESENTATIONS — WARRANTIES. — As to when representations made by one in an application for insurance upon his life constitute warranties, see *Continental L. Ins. Co. v. Rogers*, 119 Ill. 474; 59 Am. Rep. 810, and note 816-822; *Day v. Mutual Ben. L. Ins. Co.*, 1 McAr. 41; 29 Am. Rep. 565, and note 575-578; *Whitmore v. Supreme Lodge*, 100 Mo. 37. In *Supreme Council v. Green*, 71 Md. 263, 17 Am. St. Rep. 527, it was decided that where one of the objects of a benevolent society is to create a fund out of which to pay certain sums to the family, orphans, or dependents of deceased members, a statement in an application for membership, falsely alleging the beneficiary to be the applicant's niece, will defeat an action to recover the insurance money, it being provided in the application that any false statement therein should forfeit the rights of the applicant and his beneficiary.

CASES
IN THE
COURT OF ERRORS AND APPEALS
OF
NEW JERSEY.

VERNER v. BETZ.

[46 NEW JERSEY EQUITY, 266.]

MORTGAGES—REMEDY OF MORTGAGEE FOR REMOVAL OF PERSONAL PROPERTY.

— Where a mortgage is regarded as a conveyance of the legal title to the property, giving the mortgagee a right of possession, his legal ownership and actual or constructive possession give him the right to follow and recover personal property severed from the mortgaged premises; but where the mortgage is regarded merely as security, and the mortgagor has the right of possession until ejectment or foreclosure, the mortgagee has merely the right to restrain the removal of such property by injunction, to protect his lien; or, after removal, to recover damages of the mortgagor for the wrongful diminution of his security.

MORTGAGES—RIGHT OF MORTGAGOR TO SELL PERSONAL PROPERTY. — Where the mortgagee holds title under the mortgage only as security for his lien, the mortgagor in possession is the owner of the personal property on the mortgaged premises, as to innocent third parties, and he may sever and sell it, until restrained by injunction, ejected by entry, or barred by foreclosure.

MORTGAGES. — **MORTGAGEE MAY AT ANY TIME** have the security of his lien protected by injunction against the severance of personal property from the mortgaged realty.

MORTGAGOR—TITLE OF BONA FIDE PURCHASER OF BUILDING SEVERED FROM MORTGAGED REALTY. — Where a building situated on mortgaged realty, and subject to the mortgage, is severed and sold by the mortgagor in possession, having the legal title, to an innocent purchaser, the mortgagee's lien in equity is gone, and his only remedy is by action at law against the mortgagor to recover damages for impairing his security.

BILL to foreclose a mortgage held by the respondent, Betz, against August Muench. When this mortgage was executed, the premises described therein consisted of a dwelling-house, and a parcel of land on which it was erected. Afterwards

Muench removed the house from the mortgaged land, and sold it to Henry Verner. The other facts are stated in the opinion. The decree of the court below was to the effect that, unless Verner paid the mortgagee's debt and costs within twenty days, a receiver should be appointed to move the house back upon the mortgaged premises, and that they together be sold to satisfy the mortgage debt and costs. Verner appealed.

John W. Wartman, for the appellant.

W. S. Casselman, for the respondent.

SCUDDER, J. The exact form in which this decree is made, for the removal of the house back to the mortgaged premises from which it was taken, is, so far as my examination of the authorities has gone, without precedent. But this may be not objectionable, if, in administering equitable relief, it be found necessary to apply a remedy which is unusual. The design of the bill is to restore to the mortgagee his security, which he alleges has been taken from him by the severance of the dwelling-house from the land covered by his mortgage, and its annexation to land owned by another. The defense is, that the house was removed on another lot to make room for a larger building which was to be extended over on the lot of land from the adjoining premises; that the defendants acted in good faith; that the complainant had notice, and, if he did not consent, did not object; that a full money consideration was paid, without any actual notice of the lien of the mortgage on the land from which the building was removed, and that the defendant, Verner, who appeals, is a *bona fide* purchaser of the building.

The facts are not as fully proved as they might have been, and are thus likely to mislead the court. We do not find in the evidence proof of the knowledge of the defendant, Verner, of the transfer of the building from one lot of land to the other, by which he may be charged with constructive notice of the lien of the mortgage, nor actual notice of a fraud that was intended, which appears to have been satisfactory to the court below.

It appears that Verner lived in Philadelphia up to February 15th, when he moved to Camden and opened a grocery store, about two squares from Muench's place of business, and after that time went there frequently. He kept bar for him from May to August. Muench testifies that the house was removed

about the 3d or 4th of February, and thinks they started in January. This was before Verner came to Camden. Verner says he did not know that the house had been moved from another lot until after he had bought it. This evidence, if believed, shows that he neither saw nor knew that the house was moved from the mortgaged premises, and there was not a fraudulent knowledge or collusion in the purchase. Without proof of such collusion, the testimony of two witnesses, that Muench told them "he removed the dwelling-house so that if the sheriff came on him he would have a house, anyhow," is not competent to show that Verner had knowledge of a fraudulent purpose and participated in it. If said, it was spoken between other parties in his absence: *Faulkner v. Whitaker*, 15 N. J. L. 438. The payment of the consideration, by Verner to Muench, is testified by them and by Muench's wife, who says she saw money paid, without knowing the amount. The purchase price, they say, was thirteen hundred dollars, paid in different sums, at several times, — four hundred dollars on February 15th, three hundred dollars July 30th, five hundred dollars on August 1st, and one hundred dollars in wages due Verner. The first money was brought from Philadelphia, obtained by selling out a grocery there, and cash on hand; the second and third payments were, as Verner says, borrowed from his brother. The first sum was four hundred dollars, loaned to assist Muench in building; afterwards, he says, when he asked for it, he was told that he, Muench, had no money, and he offered to sell the house and lot; he did not want it, but with the advice and help of his brother he bought it to save losing the money he had loaned. Although this money was all paid before August 3d, when the deed was dated, it was not a pre-existing debt, without parting with anything of value at the time of conveyance, depriving the defendant, Verner, of the character of a *bona fide* purchaser for value, as was argued by counsel, but all, excepting the first two items, were parts of a present consideration, appropriated, when made, to its payment, and sufficient to constitute the defendant, Verner, a *bona fide* purchaser in equity: *Mingus v. Condit*, 23 N. J. Eq. 313; *De Witt v. Van Sickle*, 29 N. J. Eq. 209; *Bassett v. Nosworthy*, Finch, 102; 2 White and Tudor's Lead. Cas. 1.

The small profit derived from the grocery store conducted by his wife while he attended bar for Muench, and before that time; the fact that Muench collected rent of the tenant, after the alleged sale, as Verner's agent; and the failure to produce

the brother who was said to have loaned the money to complete the purchase, — cast suspicion on the consideration; but as the proof now stands, with the positive evidence of three witnesses to sustain it, and nothing more than these circumstances to overcome it, we do not feel warranted in saying that this payment was not made. Muench swears positively that he received these sums of money, and applied them to making the improvements for the summer-garden.

Assuming that the appellant, Verner, bought the house, and paid for it a valuable consideration, without knowledge of its removal, as appears by the direct proof, and that Muench sold it, as he testifies, to raise money to pay for the hall building and the improvements he was making, the important question is presented, whether the complainant is in a position to obtain the relief he asks here for the injury he has sustained.

Can a court of equity return to the wasted property the building that has been wrongfully removed, and sold to a *bona fide* purchaser, after being affixed to other land not included in the mortgage?

The subject of legal and equitable relief, where such removals are made, is considered by Jones on Mortgages, sections 143, 144, 453, and 684, with abstracts from cases, and numerous citations in the notes. It is a question on which the authorities are divided, and depends for its solution on the effect given to a mortgage of lands.

It seems that where the mortgage is regarded as a conveyance of the legal title to the property, giving the mortgagee the right of possession, there his legal ownership and actual or constructive possession give him the right to follow and recover the property severed. The principle applied is, that property severed from the realty, so as to become a chattel, belongs to the legal owner of the land. But where the mortgage is regarded merely as a lien for security, and the mortgagor has the right of possession until ejectment or foreclosure, there the mortgagee has merely the right to restrain the removal of the property by injunction, to protect his lien; or, after the removal, a right to recover damages for the wrongful diminution of his security.

The case of *Hamlin v. Parsons*, 12 Minn. 108, 90 Am. Dec. 284, comes nearer to the conclusion reached by the decree in this case than any other to which my attention has been called. There the mortgagor moved a dwelling on an adjoining lot belonging to his wife, without the knowledge of the mortgagee,

but with the knowledge of the wife, and it was held that the lien on the dwelling-house remained, and the mortgagee might sell the lot of land covered by the mortgage, and afterwards the house, to satisfy his mortgage. But in *Harris v. Bannon*, 78 Ky. 568, where a petition was filed in equity to subject to the lien created by the mortgage a number of cottage buildings which had been removed to other land and affixed, it was held that when the buildings were severed from the mortgaged premises, and had become part of another freehold, the lien upon them was gone. In *Peirce v. Goddard*, 22 Pick. 559, 33 Am. Dec. 764, the materials of a dwelling-house on mortgaged land were used in the construction of a house upon another lot of land; it was said the right of property vested in the grantee of that land, and the mortgagee could not maintain trover against the purchaser, either for the new house, or the old materials used in its construction.

In *Cooper v. Davis*, 15 Conn. 556, mill-stones were severed from the mill, and sold by the mortgagor; it was held that the title passed to the purchaser, and there was no power to seize them after they had been severed and carried away.

In *Buckout v. Swift*, 27 Cal. 433, 87 Am. Dec. 90, where a house subject to a mortgage was floated off by a flood into the street, and was bought while in that position, it was said that the severance affected the right of lien, that a building on land was subject to the lien of the mortgage whether there at the time of the mortgage or built there afterwards, but when severed, the lien was lost. If the contrary were the law, everything affixed to mortgaged lands might, when severed and sold to a *bona fide* purchaser, be followed and reclaimed: *Clark v. Keyburn*, 1 Kan. 281; *Kimball v. Darling*, 32 Wis. 684; *Van Pelt v. McGraw*, 4 N. Y. 110; *Gardner v. Heartt*, 3 Denio, 232; *Lane v. Hitchcock*, 14 Johns. 213; *Hutchins v. King*, 1 Wall, 53; *Gore v. Jenness*, 19 Me. 53; *Gooding v. Shea*, 103 Mass. 360; 4 Am. Rep. 563; *Byrom v. Chapin*, 113 Mass. 308; *Wilson v. Maltby*, 59 N. Y. 126, and many other cases might be cited, as illustrating the differences of opinion, and the principles applied in determining the rights of parties when fixtures are severed and sold from mortgaged lands.

A distinction is made in *Hoskin v. Woodward*, 45 Pa. St. 42, where it is said that "a mortgagor may sell, in the usual way, lumber, fire-wood, coal, ore, or grain growing on the land, until the mortgagee stops him by ejectment, or estoppelment, for these things are usually intended for consumption and sale, and the

sale of them is the usual way of raising the money to pay the mortgage. But in the case of a factory, or other building, it is from the use of it as it is, and not by its consumption, or its sale by piecemeal, that all its profits are to derived."

It is manifest that this cannot be reconciled with cases cited above, as furnishing a rule applicable to all fixtures, but that any general rule must be based on the right of property. If the mortgagee have the legal ownership and right of possession, he may follow things severed and removed from the mortgaged lands, without his consent, wherever he can find them. If he holds title under the mortgage only as security for his lien, then the remedies appointed for preserving the security, and compensating for any loss sustained by its diminution, are such only as the mortgagee may use. The theory in the latter case is, that as to innocent third parties, the mortgagor is the owner of the property, and may sever and sell until restrained by injunction, ejected by entry, or barred by foreclosure.

In any view taken of the respective rights of the mortgagor and mortgagee, the latter may have the security of his lien protected by injunction: *Brady v. Waldron*, 2 Johns. Ch. 148; *Emmons v. Hinderer*, 24 N. J. Eq. 39.

In our state, the title of the mortgagee to lands under his mortgage has been defined by this court in *Shields v. Lozear*, 34 N. J. L. 496, 503, 3 Am. Rep. 256, where it is said that the mortgage is regarded, not as a common-law conveyance on condition, but as a security for debt, the legal estate being considered as subsisting only for that purpose. This is elsewhere called the equitable and the American doctrine, by which the mortgagor has a right to lease, sell, and in every respect deal with mortgaged premises as owner, so long as he is permitted to remain in possession, and so long as it is understood and held that any person taking under him takes subject to all the rights of the mortgagor: 4 Kent's Com. 157.

There is no difficulty in applying this rule while fixtures remain attached to the realty, and so long as the mortgagor continues in possession; or when the property severed passes into the possession of a person in collusion with him to defeat the lien and security of the mortgagee, whether upon or off the mortgaged premises, it would seem that the rights of the mortgagee would be unaffected. But when the property is severed and sold by a mortgagor in possession, having the legal title, to an innocent purchaser, the lien in equity is gone, and the

remedy of the mortgagee is by an action at law against the mortgagor and those who act with him to impair or defeat the security of the mortgage.

The case of *Kircher v. Schalk*, 39 N. J. L. 335, holds that a mortgagee of real estate, whose debt is due, but who has not entered into possession, cannot maintain replevin for a steam-engine affixed to the realty subject to the mortgage, which the mortgagor or his assigns had severed from the realty and removed from the premises, because the mortgagee cannot, with propriety, insist upon being legally entitled to a remedy the enforcement of which pertains to the general legal ownership of the land. But in *Jackson v. Turrell*, 39 N. J. L. 329, it was decided that a mortgagee may maintain an action on the case against the mortgagor, or his assigns, for an injury to the security resulting from the removal of fixtures, or other waste by the defendant. Notice, without fraud, was said to be sufficient to charge the purchaser with liability.

It is not necessary in this case to determine whether a court of law will enforce this remedy against a *bona fide* purchaser without actual notice, or the exact form of remedy that may be there used; but in a court of equity, the right of such purchaser is equal to the equity of a mortgagee who has not such title to the article severed that he can maintain an action for the recovery in specie of the fixture removed.

It is a maxim, that where there is equal equity the law must prevail. It is upon this account that a court of equity constantly refuses to interfere, either for relief or discovery, against a *bona fide* purchaser of the legal estate, for a valuable consideration, without notice of the adverse title, if he chooses to avail himself of the defense at the proper time and in the proper mode: 1 Story's Eq. Jur., sec. 64 c.

The conclusion given in 2 Pomeroy's Eq. Jur., sec. 743, on this matter is, that wherever one or the other of the parties has a legal estate over which a court of law can exercise jurisdiction, then, in an equity suit between them, as a general rule, the defense of a *bona fide* purchaser for valuable consideration will avail, as against the plaintiff, whether he has a legal or an equitable estate; in either case, the court of equity simply withholds its hand and remits the party to a court of law.

In the review of cases which appear to conflict with the conclusion in this case, cited from the English courts, it must be borne in mind that there the mortgagee has the legal title to the mortgaged land, and the right of possession.

Having found that the appellant, Verner, is a *bona fide* purchaser of the building in controversy, affixed to his land, according to the weight of the evidence, as presented, the decree will be reversed and modified so that the land described in the mortgage, with the building and improvements thereon, as they existed at the time of filing the bill, shall be sold to satisfy the mortgage; and as to the injury sustained by the removal of the building formerly on the land, the mortgage will be remitted to his remedy at law.

MORTGAGES — RIGHTS OF MORTGAGEE. — A mortgagee in possession will not be enjoined for committing waste upon the mortgaged premises, unless the acts complained of are such as to render the security insufficient for the satisfaction of the mortgage debt, or at least of doubtful sufficiency: *Moriarty v. Ashworth*, 43 Minn. 1; *ante*, p. 203, and note; for the title and right to possession are in the mortgagor: *Grether v. Clark*, 75 Iowa, 383; 9 Am. St. Rep. 491, and note; *Killebrew v. Hines*, 104 N. C. 182; 17 Am. St. Rep. 672; *Berthold v. Holman*, 12 Minn. 335; 93 Am. Dec. 234.

MORTGAGES, MORTGAGOR'S INTEREST UNDER. — A mortgagor of land may continue to cut and sell timber growing thereon, although insolvent: *Angier v. Agnew*, 98 Pa. St. 587; 42 Am. Rep. 624. Nor is a purchaser of lands at a foreclosure sale entitled to the ungathered crops, as against a purchaser thereof from the mortgagor before the foreclosure: *Willis v. Moore*, 59 Tex. 628; 46 Am. Rep. 284, and foot-note.

IF FIXTURES ARE WRONGFULLY SEVERED OR REMOVED from the mortgaged premises, the mortgagee may, if a deficiency remains after foreclosure, maintain an action against one who severed and removed them, claiming under a purchase from the mortgagor: *Lavenson v. Standard Soap Co.*, 80 Cal. 245; 13 Am. St. Rep. 147, and note.

STANDARD UNDERGROUND CABLE COMPANY v. ATTORNEY-GENERAL.

[46 NEW JERSEY EQUITY, 270.]

TAXATION — CONSTITUTIONAL LAW. — THE POWER OF THE LEGISLATURE TO IMPOSE TAXES on persons, property, business, and franchises is unlimited, save only by such restrictions upon the exercise of that power as are found in the organic law, or such as are inherent in the nature of the subject.

TAXATION. — A LICENSE TAX IMPOSED ON CORPORATIONS for exercising their franchises is not a property tax, and cannot conflict with constitutional provisions requiring equality in the taxation of property.

TAXATION OF CORPORATE PROPERTY. — The holding of a charter from one state, when the corporate property is located or corporate business transacted in another state does not relieve the corporation in both or either state from taxation, in any form which the legislative power may, under its constitution, adopt.

TAXATION — INTERSTATE COMMERCE. — The manufacture of that which may become a subject of commerce and ultimately pass into protected trade is not commerce, nor can manufactories of any sort be instruments of commerce within the meaning of the doctrine of interstate commerce.

STATUTES, EVIDENCE TO VARY OR CONTRADICT. — A statute legally authenticated cannot be annulled, varied, or contradicted by the legislative journals, or in any other mode.

TAXATION — JURISDICTION TO TEST VALIDITY OF STATUTE. — Where a statute employs an injunction merely as a means of enforcing payment of a tax levied under it; the refusal to pay such tax presents a proper case for an injunction; but the validity of the tax presents a legal question of which the courts of law have exclusive jurisdiction.

A. Q. Keasbey and Sons, for the appellant.

Attorney-General, pro se.

KNAPP, J. The proceeding which gives rise to this appeal was had under the seventh section of the act of the legislature, approved April 18, 1884, entitled "An act to provide for the imposition of state taxes upon certain corporations, and for the collection thereof." The provision of that section is: "That in addition to other remedies for the collection of such tax [taxes imposed under that act], it shall be lawful for the attorney-general, either of his own motion or upon request of the state comptroller, whenever any tax due under this act from any company shall have remained in arrears for a period of three months after the same shall have become payable, to apply to the court of chancery by petition, in the name of the state, upon five days' notice to such corporation, . . . for an injunction to restrain such corporation in the exercise of any franchise or the transaction of any business within this state until the payment of such tax and interest due thereon, and the costs of such application. . . . The said court is hereby authorized to grant such injunction on a proper case appearing, and upon the granting and service of such injunction it shall not be lawful for such company thereafter to exercise any franchise or transact any business in this state until such injunction be dissolved."

The decretal order appealed from awarded such injunction against the appellant for failure to pay a tax of one tenth of one per cent on its capital stock, imposed by the state board of assessors under the provisions of the fourth section of said act, upon the appellants as a manufacturing corporation not carrying on its business in this state.

The act, as its title imports, had for its object the imposition

of a license or franchise tax upon certain of the corporations of this state.

The first section directs a tax against certain corporations doing business in this state. It embraces telegraph, telephone, cable, electric-light, certain express companies, every gas, palace, parlor or sleeping car company, every oil or pipe line company, and every fire, marine, life, or accident insurance company.

The second section requires statements to be made to state officers by the corporations named in section 1 of certain data to serve as bases for assessments.

The fourth section directs the rate of taxation to be levied against the corporations specified in the first section, and then further provides that "all other corporations incorporated under the laws of this state, and not hereinbefore provided for, shall pay a yearly license fee or tax of one tenth of one per centum on the amount of the capital stock of such corporation; provided, that this act shall not apply to railway, canal, or banking corporations, or to savings banks, cemeteries, or religious corporations, or purely charitable or educational associations, or manufacturing companies or mining companies carrying on business in this state."

The appellant is a corporation incorporated under the laws of this state; it is a manufacturing company; it has an office in this state, and procures from other manufacturing corporations in the state much of the material used by it; but the manufacture of its special product, into which these materials enter, is carried on in the state of Pennsylvania.

It must therefore, under the rulings in this court, be held to be a company not transacting its business in this state, within the meaning of this law: *American Glucose Co. v. State*, 43 N. J. Eq. 280.

But it is objected that this law, if it be construed so as to uphold the tax against the appellant, is violative of that provision of the amended constitution of this state found in article 4, section 7, paragraph 12, which provides "that property shall be assessed for taxes under general laws, and by uniform rules, according to its true value." The tax, payment of which is sought to be enforced by this proceeding, does not fall within that constitutional provision.

The power of the legislature to impose taxes on persons, property, business, and franchises is unlimited, save only by such restrictions upon the exercise of that power as are found

in the organic law, or such as are inherent in the nature of the subject.

The fault of this position is the assumption that this tax is one upon property. Such, manifestly, is not the case. The law in question imposes a tax on certain corporations by way of a license for exercising corporate franchises. It is declared to be such tax by the act, and although it is laid on this class of corporations with respect to the capital stock, the tax possesses the legal quality of a license or franchise tax: *Evening Journal Association v. State Board of Assessors*, 47 N. J. L. 36; 54 Am. Rep. 114; Cooley on Taxation, 2d ed., 379, and cases cited.

Upon the power of the legislature to impose such a tax, there exists no restriction in our constitution. As a license or franchise tax, it is not within the equality clause of the constitution referred to.

In those states in the Union having constitutional provision requiring equality in the taxation of property, it is uniformly held that such provisions do not abridge or apply to the legislative power of indirect taxation by taxes on franchises, privileges, trades, and occupations: Cooley on Taxation, 176 et seq., and cases cited; *State Board of Assessors v. Central R. R. Co.*, 48 N. J. L. 146, 356.

It is next insisted that this law is void because it is a regulation of commerce between the states, and an infringement upon the exclusive power of Congress over that subject under the provisions of the federal constitution.

This position seems to be based on two grounds: 1. That all corporations holding a franchise from one state and performing their functions in another are engaged in interstate commerce; and 2. That the business of this particular corporation, namely, the manufacture of electric cables, is itself internal commerce.

These grounds impress me only by their novelty. Our general laws for the organization of corporations permit companies to transact their business in other states. It certainly has not been supposed that the exercise of this right put them beyond the reach of taxation everywhere, or brought them into any relations whatever with the provision in the federal constitution referred to. No case is cited giving the slightest countenance to the notion that to hold a charter from one state when the corporate property is located or corporate business transacted in another state relieves the corporation in

both or either state from taxation in any form which the legislative power may, under its state constitution, adopt; nor any case in which these conditions are given the slightest consequence in ascertaining the limit of the state power to tax either the property of the corporation where such property has its *situs* or its franchises in the state which granted them.

Under the point that the appellant is engaged in, or is an instrument in, interstate commerce, cases in the federal courts are liberally cited in the brief of counsel, throwing light on the relation which state taxation holds to the exclusive power of Congress to regulate commerce between the states, and defining what is internal commerce, such as is removed from state interference and obstruction. It is scarcely necessary to say that none of those cases gives the slightest countenance to the notion that the manufacture of that which may become a subject of commerce, and which may ultimately pass into protected trade, is commerce itself, or that manufactories of any sort can be instruments in commerce.

Railroads and telegraphs may become instruments of interstate or international commerce, and when, as such instruments, they are in action, they may not be obstructed by state impositions and restrictions; hence it was held in *Western Union Tel. Co. v. Massachusetts*, 125 U. S. 530, that the telegraph company having brought itself within the provisions of the act of Congress of July 24, 1886, entitled "An act to aid in the construction of telegraph lines and to secure to the government the use of the same for postal, military, and other purposes," that collection of a tax imposed upon the telegraph company, on its property in Massachusetts, could not be enforced by injunction, although the taxing act provided for that as one mode of enforcing payment; the reason being that an injunction enforced in that state would put a stop to its general operations. The tax, however, was held to be valid, and the state was left to its other remedies for its collection. *Pensacola Tel. Co. v. Western Union Tel. Co.*, 96 U. S. 1, *Western Union Tel. Co. v. Texas*, 105 U. S. 460, are also instances of illegal interference with companies as instruments of commerce. But each of these cases holds the companies to be subject to taxation, otherwise legal, which do not obstruct or place a direct burden upon them either as instruments of general commerce or as agents of the United States.

The case of *Coe v. Errol*, 116 U. S. 517, marks the point where the subjects of commerce pass out of the state's power

to tax, and come within federal protection. That point is not reached when they become finished production. It is there held that goods, the product of a state, intended for exportation to another state, are liable as part of the general mass of property of the state of their origin until actually started in course of transportation to the state of their destination, or are delivered to a common carrier for that purpose; that carrying and depositing them at the depot for the purpose of transportation is no part of such transportation. There are many and important steps between the mere manufacture of insulated telegraph wires or cables and the establishment of an interstate or foreign telegraph line. It may as well be said of the corporation that excavates copper or iron from the earth, as it may of the corporation which converts that copper or iron into wires or insulated cables, that it is engaged in or becomes thereby an instrument in interstate commerce.

The earnestness with which these objections against the law in question was pressed seemed to require consideration to the extent that has been given them.

I think there can be no doubt that in this proceeding the constitutionality of the law under which the tax was imposed may be brought in question, and the validity of the law under the constitution be passed upon. For if the act be invalid on constitutional ground, the court should so declare, and refuse to enforce it.

This law, however, is not an unconstitutional exercise of the taxing power.

It will be proper to notice another objection raised against this decree. It touches the construction of the latter clause of the fourth section of this statute, and the admissibility of certain testimony offered to aid in its construction. Effort has been made to show that the qualifying words, "carrying on business in this state," which conclude this section, refer to mining companies only, thus leaving all other companies designated in the proviso, wherever they may transact their business, exempted from the operation of the law. It is contended that such would be the necessary construction of the proviso if the words "manufacturing companies" had been followed by a comma. We are then referred to evidence taken from the files and journals of the two houses, showing the course of legislation through which this bill passed. This was designed to show, *inter alia*, that the last clause of the proviso came into the bill by amendment, the draught of which, as

accepted by the two houses, contained the desired punctuation. It is also thought that the order in which the amendments were introduced, and the form of words used in the amendments, indicate an intention favorable to the appellant's view. The vice-chancellor decided against the admissibility of this testimony. He permitted it to be taken, but expressly declined to give it any effect in decision, basing his judgment on the authority of *Pangborn v. Young*, 32 N. J. L. 29. With the judgment excluding the evidence I fully agree. In the case referred to, the question of the admissibility of such testimony to annul, vary, or contradict statutes legally authenticated, received from the court the fullest and most careful consideration, and the judgment reached was put upon grounds that would seem to be impregnable. It has the support of the soundest reason and abundant authority. It has stood unquestioned in this state for a quarter of a century, and in *Passaic v. Stevenson*, 46 N. J. L. 173, received the express approval of this court. That case must now be regarded as declaring the settled law of this state. The distinction sought to be drawn between that case and this is illusory. The principle established in the decided case is controlling in this. The general doctrine declared was, that the enrolled statute of a state "is conclusive proof of the enactment as well as the contents of the statute, and that such attested copy cannot be contradicted by the legislative journals, or in any other mode." Now, whether the attempt be by such extrinsic means to add to, take from, or entirely abrogate the law, it equally assails that conclusiveness of proof ascribed to the duly authenticated statute.

This statute, then, must be interpreted by the aid of those rules which the common law affords us. The proviso, I think, is clearly an ambiguous sentence. The qualifying words, I think, can be applied in only one of two ways: one as embracing all the corporations named as excepted from the operation of that general taxing clause in the law, and the other as applying to the last-named only, namely, mining corporations. There is no grammatical rule by which, from the mere wording of the clause, it can be determined in which application those words are to be used.

The particle "or," frequently occurring in the sentence, is certainly here used in its copulative and not in its disjunctive sense.

These qualifying words relate to and qualify some antecedent

substantive. Now, I think the better construction is, that that substantive so qualified is corporations, variously named as companies, associations, corporations, and that the terms designating the various sorts of corporations, as railroads, canals, manufacturing, mining, etc., are merely descriptive words, or noun-adjectives. Accepting this as a proper construction, the qualifying words relate to all corporations designated in the proviso. This construction better comports with the spirit and reason of the law.

The scheme of this particular taxing act seems to be to impose taxes on three classes of corporations: certain specified corporations doing business in the state wherever chartered; those not doing business in this state, but holding their charters under state authority; and a class of unspecified corporations, which must be few in number, holding charters under and performing their functions in the state.

In the former class, different provisions for taxation as amongst themselves are adopted, and in the second and third classes named, a franchise tax is imposed, based upon the amount of their capital stock.

By reference to other taxation laws in the state, it will be observed that provisions exist for the taxation or exemption of all corporations specified in the proviso, and having their property and business in this state. It was quite reasonable, therefore, that the legislature should remit such corporations to the operation of such laws. The general intention seems to be, that all corporations incorporated under laws of this state, and not doing business here, shall pay a tax on their franchise.

If the words "carrying on business," etc., in the proviso, apply to mining companies only, then a mining company incorporated but not doing business here would be subject to taxation, while the other corporations named,—railway, manufacturing, etc.,—incorporated but not doing business here, would be exempt. It is quite unreasonable to suppose that the legislature intended to single out for taxation so insignificant a class as mining companies from all other corporations chartered here and carrying on their business elsewhere. On the other hand, to give the qualifying words application to all the corporations named in the proviso, they are very properly removed from the operation of this act, for the reason that their taxation is elsewhere provided for.

Under the construction which we give to this law, it will fall symmetrically into our system of corporate taxation.

Under that system, tax is laid on the corporation, business, or property when its corporate operations or property are here. When its real business and property are elsewhere, and out of state protection, a tax on the franchises and privileges upheld by the state alone is imposed. Such a system is as near an approach to that equality which is desirable in all taxation as any other scheme that may be suggested.

We have considered this portion of the act of 1884, not for the reason that it was deemed at all essential to the decision of this case, but for the reason that the court having heard discussion on the subject, silence might imply that the mind of the court was unsettled as to its meaning. In this proceeding, the discussion of the question has no necessary or appropriate place.

The legislature gives no evidence, in the provisions of the seventh section of the act, of the fruitless design to transfer this purely legal question from the law court to equity. From the plain words of that section, it will be seen that injunction is merely a means employed for enforcing payment of the tax levied, and was not designed to institute a suit in which the validity or regularity of the tax is open to controversy. And unless the validity of the law under which the tax is imposed is successfully assailed on constitutional grounds, a tax imposed under color of it, and not stayed in its collection by pending proceedings in *certiorari*, presents a case for the exercise of this special jurisdiction by the chancellor, and thereby, in the language of the act, "a proper case appears" for the injunction order.

For decision of the other questions touching the validity of the tax, resort must be had to the supreme court through *certiorari*. In the review of these questions, the jurisdiction of the supreme court is exclusive.

The orders should be affirmed.

TAXATION, POWER OF. — The power of taxation and the manner of exercising it belong to the legislature, subject to such restrictions as are imposed by the constitution: *Williams v. Cammack*, 27 Miss. 209; 61 Am. Dec. 506, and note; *Anderson v. Kerna*, 19 Ind. 199; 77 Am. Dec. 63; *State v. Bank of Smyrna*, 2 Houst. 99; 73 Am. Dec. 699; note to *Mayor v. State*, 74 Am. Dec. 591. And the taxing power may select the objects of taxation and determine the extent of taxation: *Hill v. Higdon*, 5 Ohio St. 243; 67 Am. Dec. 289; *State v. Bank of Smyrna*, 2 Houst. 99; 73 Am. Dec. 699.

STATUTES, CONSTRUCTION OF. — Courts do not weigh the inducements leading to a compromise act of legislation: *International etc. R'y Co. v. State*, 75 Tex. 357. The object of an act being expressed in its title as passed, the title of the act at any of the preceding stages is immaterial: *Hart v. McElroy*, 72 Mich. 446. Congressional debates cannot cut much figure in the construction of a consistently worded statute: *Bernier v. Bernier*, 72 Mich. 43. Only when a literal construction of a statute is calculated to work a wrong will the intention of the legislature govern, where the intention is inconsistent with the letter of the law: *Stone v. Hill*, 72 Tex. 540. New laws in a revision must be interpreted in connection with the facts of public history, showing the reasons for their enactment, the wrong intended to be remedied, and the method of its prevention: *Garland v. Board of Commissioners*, 87 Ala. 223. Statutes *in pari materia* are to be construed together as one system: *Graham v. Guna*, 87 Tenn. 458. A printed bill bearing a title and number identical with the one described cannot be considered to prove the contents of the bill in question: *State v. Keisewetter*, 45 Ohio St. 254. The enacting clause of a statute, however clearly expressed, can have no effect beyond the object expressed in the title: *State v. Township Committee*, 50 N. J. L. 496.

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CASES

IN THE

COURT OF CHANCERY

OF

NEW JERSEY.

VOORHEES v. VOORHEES.

[46 NEW JERSEY EQUITY, 411.]

MARRIAGE AND DIVORCE. — EFFECT OF ANNULMENT OF DECREE OF DIVORCE FOR FRAUD in its procurement is to restore the parties to their matrimonial relations as they stood before the decree was pronounced.

MARRIAGE. — ESSENTIALS OF VALID MARRIAGE are capacity and consent.

MARRIAGE. — COHABITATION AND REPUTATION DO NOT CONSTITUTE MARRIAGE, but are only evidence tending to raise a presumption of marriage, from circumstances. In any case, the cohabitation must not be meretricious, but matrimonial, to raise the presumption.

MARRIAGE IS A CIVIL CONTRACT, AND NO CEREMONIAL is indispensably requisite to its creation. A contract of marriage made *per verba de presenti* is a valid marriage.

MARRIAGE. — WHERE ACTUAL MARRIAGE IS SHOWN, whether legal or illegal, the subsequent cohabitation and reputation of the parties must be regarded as having their origin in such marriage, and cannot be treated as creating a presumption that the parties contracted a subsequent marriage at a later date.

H. E. Richards, for the complainant.

T. D. Hodges, for the defendants.

VAN FLEET, V. C. The complainant is the only child of Abraham Voorhees and Camilla C., his wife. His parents were married at Madison, in this state, on the 5th of January, 1860. He was born in October, 1861. His father died in February, 1882. His mother is still living. He brings this suit to recover one sixth of the residuary estate of John F. Voorhees, deceased. John F. Voorhees was the father of Abraham Voorhees, and the grandfather of the complainant. He died testate, in November, 1867. His will disposes of his

residuary estate as follows: "All the rest and residue of my estate I give equally to all my children who may be living when the same is ascertained, the children of any who may have died receiving such share as their parent would have received if living."

The complainant claims the right to stand in the place of his father, and to take all that his father would be entitled to if living. His right in this respect is disputed. It is claimed that two other persons have the same right that he has. These persons are Gardner T. Voorhees and Margaret L. Voorhees. They claim to be children of Abraham Voorhees, and, as such, they insist that they are entitled to the same share of John F. Voorhees's residuary estate that the complainant is. The only question to be decided is, whether their claim is valid or not. The dispute in the case grows out of the following state of facts: On the fifteenth day of February, 1867, Abraham Voorhees brought a suit for divorce against his wife, Camilla, in the superior court of Connecticut. He represented to the court in which he brought his action that his wife resided in the city of New York, and notice of the pendency of his suit was sent addressed to her there. He knew that she resided at Madison, in this state, and that notice sent to her at New York would not reach her. She did not receive notice of his suit. A decree of divorce was pronounced in his favor in March, 1867. On the third day of September, 1867, he married another woman in the state of Massachusetts. This woman knew that he had had a previous wife. She was at his father's house in the summer, 1866, and there learned that he had a wife, and that he and his wife were living in a state of separation. Camilla, the first wife, learned in November, 1867, for the first time, that her husband had brought a suit against her which had resulted in a decree divorcing them. On the 4th of December following, she applied for the vacation of the decree of divorce, on the ground that it had been obtained by fraud. Her husband appeared and resisted her application, but the court, in December, 1868, after hearing the proofs and arguments of the parties, vacated the decree and granted a new trial. The decree was annulled because it had been procured by fraud. Camilla then answered, and also filed a cross-bill praying that she might be divorced from her husband for his fault. These cross-suits were subsequently tried, and resulted in a judgment rejecting the prayer of the husband for a divorce, and granting that of his

wife. Gardner T. Voorhees and Margaret L. Voorhees are the offspring of the second marriage. Gardner was born on the sixth day of July, 1869, and Margaret on the fourteenth day of December, 1872.

The effect of the abrogation of the decree of divorce was to put Abraham and Camilla back in their matrimonial relations just where they stood before that decree was pronounced. After that decree was vacated, they stood in precisely the same matrimonial relation to each other as though no such decree had ever been made. She was his wife, and he was her husband. The matrimonial bond which united them was just as perfect as it would have been if no attempt had ever been made to break it. The marriage, therefore, which Abraham attempted to contract in September, 1867, was a nullity, and his subsequent cohabitation with the other woman was just as meretricious, as a matter of law, as it would have been if they had consorted together without going through the form of a marriage. The two essentials of a valid marriage are capacity and consent. Abraham, when he attempted to contract a second marriage, was already the husband of one wife, and so could not, for want of capacity, become the husband of another woman. This was not disputed on the argument. But it was insisted that inasmuch as it appeared by the proofs that Abraham and the woman whom he attempted to marry in 1867 lived together as husband and wife, and held themselves out to their friends and acquaintances as standing in that relation to each other for several years after Camilla had procured a divorce, it is the duty of the court to presume that Abraham and the other woman made a contract of marriage subsequent to the divorce. There can be no doubt that cohabitation and reputation will, under some circumstances, justify a presumption of marriage. They do not constitute marriage, but may, in a case where no actual marriage, legal or illegal, is shown, and where nothing appears in the conduct of the parties to indicate that their relations were illicit, rather than matrimonial, justify the court in presuming that the parties originally came together under mutual promises to take each other for husband and wife during their joint lives. Marriage is a civil contract, and no ceremonial is indispensably requisite to its creation. A contract of marriage made *per verba de præsenti* amounts to an actual marriage, and is valid: *O'Gara v. Eisenlohr*, 38 N. Y. 296-298. But the law never indulges in presumptions contrary to what the fact is

shown to be. In this case, the proofs make it very clear that no marriage of any kind was contracted by Abraham with the other woman after he was divorced from Camilla, on Camilla's application. This other woman was the only witness called to give evidence of the cohabitation and reputation on which the court is asked to base the presumption of marriage. She testified that, from the time of the marriage, in 1867, up until the summer of 1874, Abraham and she lived together as husband and wife, and that he, during the whole of this period, introduced and held her out, on all occasions, to his friends and acquaintances as his wife, and that she, in like manner, always recognized and held him out as her husband, but that in the summer of 1874, in consequence of his unkind treatment and failure to support, she separated herself from him, and never afterwards lived with him. She also testified that no second marriage ceremony was performed. She did not pretend that a second marriage, of any kind, had been contracted by her with Abraham. Indeed, she swore to a fact which renders it perfectly certain that no second marriage was contracted, and that is, that up to 1885, more than two years after Abraham's death, she did not know, and had never heard, that the decree of divorce procured by him had been vacated on Camilla's application. Without such knowledge, there was neither motive nor reason why she should desire or consent to a second marriage. Her evidence, in my judgment, establishes, beyond all doubt, the fact that no second marriage was contracted.

This being so, it is not possible to look upon the cohabitation of the parties, and the reputation which they acquired as holding the relation of husband and wife to each other, as presumptive evidence of a marriage contracted by them after Abraham acquired capacity to contract a second marriage, but they must be regarded, as they are in fact, simply as consequences naturally resulting from the illegal connection formed in September, 1867.

This case, in its essential features, is substantially like that of *Cartwright v. McGown*, 121 Ill. 388, 2 Am. St. Rep. 105. That case may very properly be regarded as the prototype of this. There a man by the name of Lewis married a woman by the name of James, in Kentucky, in 1841, and afterwards lived with her for about a year, and then abandoned her and went to Illinois. In 1843 Lewis married another woman, in Illinois, and lived with her, as his wife, from the time of their

marriage until his death, in 1838. He had several children by her, only one of whom, however, survived her. His Kentucky wife obtained a divorce in 1846. There was no issue of his marriage with her living when he died. He died intestate, seised of land in Illinois. The land was claimed by both his child and his brothers and sisters. It was awarded to his brothers and sisters, on the ground that the child was illegitimate. It was attempted, in that case, as it was in this, to induce the court to presume, from the cohabitation and reputation of the parents of the child, that they had contracted a valid marriage, although it appeared there, as it does here, that such cohabitation and reputation had its origin in an illegal marriage. The court, on this point, say: "It must be borne in mind that cohabitation and repute do not constitute a marriage, but are only evidence tending to raise a presumption of marriage, of more or less strength, according to the circumstances of the case, and that the cohabitation must not be meretricious, but matrimonial, in order to give rise to this presumption. Where a marriage in fact is shown by direct evidence, as in this case, there is no necessity for presuming its existence. Presumption must yield to the superior force of direct and positive proof." Then, after stating that the parties had attempted to unite themselves in marriage by going through a ceremony, the court adds: "Their cohabitation thereafter, and reputation as to being married, might very naturally and properly be referred to the fact of this apparent marriage, there being nothing to indicate to their acquaintances and neighbors that it was void. If no actual marriage ceremony had been shown, then the cohabitation and repute proved might be referred to some supposed informal, common-law marriage." Substantially similar views were expressed by the court of appeals of New York in *O'Gara v. Eisenlohr*, 38 N. Y. 296, 298; and as I understand the charge of Chief Justice Ewing to the jury in *Pearson v. Hawey*, 11 N. J. L. 12, he was of the opinion that where an actual marriage is shown, even if it was illegal, the subsequent cohabitation and reputation of the parties must be regarded as having their origin in such marriage, and will not justify a presumption that the parties contracted a subsequent marriage at a later date.

My conclusion is, that the defendants are not entitled to any part of the fund in controversy, but that the complainant is entitled to the whole.

MARRIAGE, WHAT CONSTITUTES.—Marriage is a civil contract which, once properly entered into, cannot be cast aside at the pleasure of the parties: *Kernhill v. Murray*, 1 Eland, 479; 18 Am. Dec. 844. The contract is personal, and has for its basis the mutual consent of the parties: *McKinney v. Clarke*, 2 Swan, 321; 58 Am. Dec. 59. Solemnization is not necessary to its validity, unless made so expressly by statute: *Fenton v. Reed*, 4 Johns. 52; 4 Am. Dec. 244. This contract is unlike ordinary contracts, however; for the state is specially interested in preserving it unbroken, and the contracting parties cannot annul it, nor can the court, except for one or more causes expressly permitted under the statutes: *Wheeler v. Wheeler*, 18 Or. 261; see also *Grimm's Estate*, 131 Pa. St. 199; 17 Am. St. Rep. 796, and note. Want of consent invalidates a contract of marriage: *Rosel v. Rosel*, 78 Mich. 133; 16 Am. St. Rep. 569, and note. A marriage *per verba de presenti* is valid, and an actual marriage may be presumed from the fact of cohabitation, coupled with reputation and declarations of the parties: *Fenton v. Reed*, 4 Johns. 52; 4 Am. Dec. 244. In *People v. Perriman*, 72 Mich. 184, a witness testified to having seen a man and woman joined in marriage, the ceremony having been performed by a person acting as a clergyman or a magistrate; the court decided that his testimony showed a valid marriage, in the absence of a statute to the contrary.

DIVORCE.—EFFECT OF SETTING ASIDE OR ANNULING A DECREE OF DIVORCE: See note to *Greene v. Greene*, 61 Am. Dec. 467. The district court may vacate a decree of divorce upon a summary application for fraud in its procurement: *Olmstead v. Olmstead*, 41 Minn. 297.

MARRIAGE, PRESUMPTION AS TO.—When a marriage has been regularly solemnized, it will be presumed valid till the contrary is shown: *Thomas v. Thomas*, 124 Pa. St. 646. Where a man is proved to have married a second time, such marriage is presumed to be legal, and such presumption is not overcome by proof of a prior marriage, and the fact that his first wife is living and has not obtained a divorce: *Coal Run Co. v. Jones*, 127 Ill. 379. When the cohabitation of man and woman is illicit in its commencement, it is presumed to continue so, until a changed relationship is proved: *Ross v. Ross*, 67 Mich. 619.

ROTHHOLZ v. SCHWARTZ.

[46 NEW JERSEY EQUITY, 477.]

SPECIFIC PERFORMANCE OF CONTRACT FOR SALE OF CHATTELS by the vendor will be decreed in equity, where the payment agreed upon by the parties was to be made by specific securities, and the remedy at law is inadequate.

SPECIFIC PERFORMANCE—PRACTICE—WAIVER OF DEFENSE.—Where, in a suit for specific performance, the defendant intends to ask the court not to exercise jurisdiction, because the remedy at law is adequate, the objection should be taken by answer, and unless so taken, will ordinarily be deemed to have been waived.

A. Stephany, for the complainant.

Baake, and J. J. Crandall, for the defendant.

PITNEY, V. C. The bill is for the specific performance of a contract for the sale of chattels. It is by the vendor against the vendee. The subject-matter is a stock of dry-goods and store-fixtures in a store at Egg Harbor City, Atlantic County, together with the good-will of the business and the unexpired lease of the premises. The sale was so far consummated that the price was fixed and a portion of the purchase-money paid, and the defendant, the purchaser, put in possession. In arranging for the balance of the purchase-money, a dispute arose between the parties as to the precise nature of the security which the contract provided for.

The contract was made on the 28th of October, 1889; possession was delivered the next day. The bill was filed November 15th, and the answer, November 25th. Upon filing the bill an order was made restraining the defendant from removing, encumbering, or selling any of the goods, except by way of retail, and that he show cause why a receiver should not be appointed. On the day fixed for hearing that order, the parties agreed to bring the cause at once to final hearing, the complainant waiving his motion for a receiver, and the defendant submitting to the continuance of the restraining order.

The price agreed upon for the stock of goods and fixtures was \$4,750, of which \$2,000 was to be paid in cash or its equivalent, and the balance in payments of about \$400 each, at periods of from three to five months, until all was paid. The parties are agreed as to the details of these deferred payments. The dispute is as to the security which was to be given for their payment. Complainant asserts that for these deferred payments he was to have a chattel mortgage upon the goods sold, and also a bond, with a warrant of attorney, to confess judgment, payable one day after date, which securities he was to hold, without recording the one or entering up judgment on the other, unless it became necessary for him so to do in order to protect himself. And the prayer of the bill is, that the defendant be decreed to specifically perform his contract by executing and delivering these securities.

The defendant denies that he agreed to give a bond and warrant of attorney to confess judgment, and alleges that the chattel mortgage was not to be recorded until thirty days after default should be made in the payment of one of the installments. By his answer, he states that prior to the filing

of the bill he was ready and willing to complete the contract in accordance with his understanding of it, and in fact formally tendered such performance before bill filed, which complainant declined to accept.

As a further defense, he sets up that after such tender, and after bill filed, he discovered that the stock of goods was not worth \$4,750, or more than \$3,500, and he insists that it will be inequitable and unjust to compel him to perform so hard a bargain, and offers to rescind on such equitable terms as the court may impose, or to perform by giving a chattel mortgage for the unpaid balance found due upon a reappraisement of the goods under direction of the court.

At the hearing, the defendant's counsel took the further ground, not set up in the answer, that the bill could not be maintained, for two reasons: 1. Because the complainant had adequate relief at law; and 2. Because the terms of the contract were not shown to have been agreed upon by either party; that the mind of the parties had not met, and hence the court could not enforce it.

The consideration of the questions so raised compels a careful examination and consideration of the facts as shown in the testimony.

Complainant had lived and kept a dry-goods store at Egg Harbor City for about fifteen years, and latterly had also been president of a national bank located there. For several months prior to the transactions in question, he had also been engaged in business in Philadelphia, where he spent most of his time during business hours, leaving the store at Egg Harbor City in the care of his wife, their residence being over the store. Defendant had been engaged in the same or similar business in Cincinnati, and was possessed of one thousand dollars in cash, and a bond and mortgage for one thousand dollars on property in Atlantic City, and the remains of his Cincinnati stock of goods. He had a brother-in-law, one Powdermaker, who kept a dry-goods store in Egg Harbor City of the same character as complainant's. Defendant was seeking an opportunity to re-engage in business, and with that view called on complainant at his house and store in Egg Harbor City on Sunday, October 20th, and perhaps once or twice before, and asked if his store and business was for sale, and at what price. Complainant replied that it was, and that his price was five thousand dollars. Defendant made little or no examination of the stock at that time, other than

such as could be made by looking about him as he stood in the store, and perhaps handling a few of the goods; but upon that examination, and complainant's statement of its amount and value, he offered four thousand five hundred dollars, if they could agree upon the terms and mode of payment, and disclosed to complainant his pecuniary situation and ability, and his willingness to pay two thousand dollars, and his desire for time in which to pay the balance. Complainant was willing to give liberal terms as to time, but required security, and inquired as to defendant's ability to give an indorser. Upon defendant's statement that he was unable to give an indorser, the negotiations were dropped. Defendant was a stranger to the complainant. On the next Thursday, October 24th, the defendant called at complainant's place of business in Philadelphia, and negotiations were renewed upon the basis of \$4,750, and upon the suggestion of complainant, that perhaps he might be sufficiently secured by chattel mortgage, or in some other mode which might be devised and approved by his counsel, Mr. Stephany, of Egg Harbor City. On that or the next evening both parties went to Egg Harbor City, and on Friday evening called on Mr. Stephany at his house there, his principal office being at Atlantic City. Up to this point there is no material difference in the statements of the parties; but as to what occurred at that interview at Mr. Stephany's, and those which followed, they do not agree. The complainant and Mr. Stephany agree in their statements, which are, in substance, that complainant asked Mr. Stephany, in defendant's presence, whether he could be made safe by a chattel mortgage on the stock to secure deferred payments spread over a period of two years, and that Mr. Stephany replied that he could not, because the chattel mortgage would not cover after-acquired stock; and being asked by complainant to suggest some method by which he could be made reasonably safe, Mr. Stephany suggested that, in addition to a chattel mortgage, the defendant should give a bond and warrant to confess judgment, payable one day after date. The conversation was carried on in German, which is the native language of all three; and Mr. Stephany swears that he fully explained to the defendant the nature and effect of the bond and warrant, and that he is satisfied that the defendant understood it. The defendant objected to a judgment bond, on the ground that it would affect his credit; and it was then or subsequently suggested that the same objec-

tion might be made to a chattel mortgage, but that it was not necessary to make use of either at once, and perhaps not at all, if defendant was prosperous, and that complainant might hold the securities in his desk, to be used as occasion might require, and if it became necessary, in order to protect himself. Such a mode of securing payment would, of course, result in defendant's putting himself in complainant's power; and it was suggested that the defendant might make inquiry, and ascertain whether complainant was the sort of a man that it would be reasonably safe for the defendant to so put himself in the power of. The complainant declined to sell except upon the terms suggested by Mr. Stephany, and the defendant declined to purchase on those terms, and the parties separated.

Defendant, as to this Friday-evening interview, denies that any mention was made of a bond and warrant of attorney to confess judgment, or in fact that it was ever mentioned until after he had taken possession. Complainant's statement of the events which followed is, that on Sunday, the 28th, defendant called upon him, at his house and store, and renewed negotiations, and finally stated that he had inquired about complainant, and was satisfied that he was an honest man, and one whom he could trust; that he had concluded to comply with his terms, and made an appointment to meet him at Stephany's office early on Monday morning to complete the transaction. The parties met accordingly at Mr. Stephany's office; and both complainant and Mr. Stephany swear that defendant said he had inquired as to complainant, and was satisfied that he was an honest man, and could be trusted, and that he had concluded to execute the securities required by complainant under Stephany's advice, and they say the bond and warrant was expressly mentioned as one of them. Here, again, defendant denies that any mention was made of that security. Some discussion then arose as to whether the stock of goods was actually worth \$4,750, and Mr. Stephany suggested an inventory. Complainant assented; and it was agreed that it should be taken, and the completion of the transaction postponed until such inventory was taken. With this understanding, the defendant was paid one hundred dollars to bind the bargain, which was left in Mr. Stephany's hands. The parties spent that day and evening in taking the inventory, without completing it; and the next morning, Tuesday, October 29th, defendant expressed himself as

satisfied, and proposed to close up the affair on the basis of \$4,750, and for that purpose both again called on Mr. Stephany. The \$2,000 payment was made up of cash, \$985, and a bond and mortgage held upon real estate in Atlantic City for \$1,015, which complainant agreed to accept as cash. It was left with Mr. Stephany, with directions to prepare an assignment to be executed by the defendant. Mr. Stephany also took a memorandum of the amount and dates of the deferred payments, and undertook to have the chattel mortgage, bond and warrant, and assignment of the real estate mortgage ready for execution at five o'clock that evening, on his return from Atlantic City; and defendant agreed to call then at that hour, and execute them. Complainant at once put the defendant in possession, and himself went to his business in Philadelphia, and did not return to Egg Harbor City till the next Saturday evening. Mr. Stephany prepared the three papers, and had them ready for execution at the hour and place appointed; but defendant did not call for them then, and so far as Mr. Stephany knows, not until near the end of the week. Defendant says he called each evening without finding Mr. Stephany. When they did meet, defendant stated that he desired to show the bond and warrant and chattel mortgage to his wife before executing them. Mr. Stephany handed all three papers to him, but he said he did not care for the assignment, but only for the chattel mortgage and bond and warrant, and took two of the papers, leaving the third on the desk. The next morning, Mr. Stephany discovered that defendant had left the chattel mortgage, and taken in its place the assignment, with the bond and warrant, and on complainant's calling on him on Saturday evening, November 2d, on his return from Philadelphia, handed it to complainant, who at once forwarded it to defendant. Shortly afterwards, defendant notified complainant that he declined to sign the bond and warrant, and would only execute a chattel mortgage on condition that complainant would give a written stipulation not to put it on record until thirty days after default in the payment of one of the deferred payments. In the mean time the complainant had procured the owner of the house and store to accept the defendant as his tenant; and by arrangement between them, he (complainant) was to continue to occupy the dwelling part of the building for a few months, and until defendant should desire it for his own use. Policies of insurance were also transferred to the

defendant, and the defendant continued in the occupation of the store and possession of the goods, and to sell goods out of the stock, over the counter, from day to day. Negotiations between the parties for a settlement of the dispute between them continued until about the time of the filing of the bill; complainant insisting upon the defendant executing the required securities, and the defendant declining so to do.

As bearing upon the question of fact whether or not defendant understood, at the interview of Friday evening, October 25th, and Monday and Tuesday mornings, October 28th and 29th, that a part of the complainant's terms was that he should execute a bond and warrant of attorney to confess judgment, we have the statement sworn to by Mr. Ballbach, to the effect that Mr. Schwartz stated to him that if Mr. Stephany had prepared the papers in time so that he could have executed them at once, he would have done so, and there would have been no trouble, intimating that he was prevented from doing so by the advice of his wife, and those whom he had consulted, and not pretending to Mr. Ballbach that he did not understand the agreement to be that he was to execute such papers.

Upon a consideration of all the evidence, and the manner of the witnesses in giving their testimony, I am entirely satisfied that the contract was made as alleged and sworn to by the complainant and Mr. Stephany, and that the defendant agreed to execute a bond and warrant of attorney, and to deliver it with the chattel mortgage, without any written stipulation as to their use, trusting to the complainant's honor not to make use of it unless it became, in his judgment, necessary to do so in order to protect himself.

But if I were in doubt upon this question, there is another consideration which, it seems to me, ought to have weight in this connection. As soon as the defendant procured from Mr. Stephany the bond and warrant of attorney, he became aware that complainant expected that he would execute that as one of the securities for the deferred payments. He immediately took legal advice upon the subject. Mr. Baake states that he was consulted by defendant on or about the 1st of November, which was Friday. Defendant had interviews with complainant on Sunday, November 3d, which made complainant's position entirely clear. It seems to me that the duty of the defendant was then very plain. If there was a misunderstanding as to the terms of the contract, the extent of that

misunderstanding was then apparent to him and his counsel, and if he was unwilling to carry out the sale on complainant's terms, he should have promptly tendered a redelivery of the possession, with an account of the goods sold in the mean time, and offered to rescind the contract and restore the complainant. Instead of that he demanded the final execution of the contract upon his own understanding of it, and retained the possession and continued to sell goods, and never, until after bill filed, offered to restore the possession. Of course, every day that he retained possession and sold goods rendered it more difficult to restore the complainant to his former position, and it seems to me that the defendant is well-nigh estopped in equity from setting up that he did not understand the contract to be as complainant understood it. In other words, he has, so to speak, waived the defense that there was no meeting of minds, or, at least, that the terms of the contract are not proven with sufficient certainty, and has chosen to stand or fall by the weight of the evidence as to what the contract was. Besides, if defendant should succeed in satisfying the court that he did not consciously agree to give the judgment bond, and should not therefore be decreed to give it, he is still in the situation of not proving that the complainant agreed to part with his goods on credit with any less security, and the plain result is, that he has purchased and taken possession of the goods at a stipulated price, without any agreement whatever as to credit, and so the purchase-money is, by implication, payable in cash, with the result that since the complainant parted with the possession upon a misunderstanding as to the terms of the credit, he has now a clear right to come into this court and ask that his vendor's lien be restored and the goods sold to pay the balance due upon the purchase-money. So that in any view that may be taken, the defense of want of agreement as to the terms of the credit cannot, under these circumstances, avail the defendant.

With regard to the defense of fraud and concealment in the sale leading to a gross overestimate of the goods, and rendering the bargain a hard one, the facts are as follows:—

Either on Sunday, October 27th, at the interview at complainant's house, or early on Monday morning, at Mr. Stephany's, when the terms of the bargain were finally agreed upon, defendant expressed a desire to be better assured of the value of the stock, and it was proposed that an inventory should be taken; to this complainant assented, and it was

agreed that it should be taken on the basis of cost price, less twenty-five per cent off, and that, whether the inventory so taken amounted to more or less than \$4,750, the defendant should pay for just the amount so found. It will be observed that the arrangement did not provide for the actual appraisement on a basis of real value, but for an ascertainment of the amount which the goods would come to upon the basis of their cost, less twenty-five per cent. Upon that basis, the work commenced early on Monday morning. Complainant disclosed to defendant his cost-mark cipher, and called in a Mr. Ballbach, a merchant of Egg Harbor City, to assist in making the inventory. The complainant took down each article,—the bulk of the goods was clothing,—examined and read the cost-mark in defendant's presence, and Mr. Ballbach wrote it in the inventory. Defendant had ample opportunities to see each article, and the cost-mark upon it. The work was continued, with intermission for meals only, until nearly or quite eleven o'clock at night. Mr. Ballbach was relieved in the evening by Mr. Dietz, the cashier of the bank, who did the work that Ballbach had been doing in the daytime. Late in the evening, the work of the day and evening was footed up, and found to amount to over three thousand nine hundred dollars, and a large quantity of goods still remained to be inventoried. The next morning the complainant was ready to proceed and finish the job; but defendant expressed himself as satisfied that if the inventory was completed it would amount to much more than \$4,750, and that he was quite satisfied to complete the purchase at that price if complainant was. To this complainant assented, and without completing the inventory the two proceeded at once, early on Tuesday morning, to Mr. Stephany's office, as before stated. During the taking of the inventory, many articles were found to be shelf-worn, faded, stained, and otherwise damaged to a greater or less extent; and objections were from time to time made by the defendant to such articles. Both complainant and his witnesses Ballbach and Dietz swear, and defendant does not deny, that as often as defendant made such objections, complainant laid the article aside, and it was not put on the inventory, and was not counted in dollars and cents. At the end of the day's work, a large pile of rejected goods had accumulated, and were allowed by complainant, and thrown in, so to speak, to the defendant, in the sale. At the hearing, a large quantity of damaged goods were

produced and exhibited to the court, to show the quality of the goods sold. But both complainant and Ballbach recognized them as a portion of the very goods so rejected from the inventory, and defendant did not attempt to dispute their testimony to that effect.

Between the filing of the bill and the answer, to wit, on the 23d of November, the defendant procured his brother-in-law, Powdermaker, and a Mr. Rosenbaum, of Atlantic City, an experienced auctioneer and general dealer, to make an appraisalment of the stock of goods; and they commenced about half-past four o'clock, P. M., and finished between ten and eleven at night, with an intermission for supper. The result footed up at a little over three thousand three hundred dollars. Messrs. Rosenbaum and Powdermaker were sworn, and from their evidence, and an examination of the inventory and appraisalment itself, I am satisfied that it is of little value. In the first place, it was manifestly made in great haste, and without sufficient time to examine, measure, and count the goods. In the second place, much of it was made on a mere estimate of quantity, as about so many yards of cloth, and the like. Many instances of this occur in the inventory, and I do not think a single instance of actual measurement is given. Then, in the third place, articles of different value were bunched together, and an average price put on them; as "106 men's suits, as follows: corkscrews, cassimeres, and satinets, odd size, at \$6. — about twenty-five different styles, — \$530." And the clothing was appraised in that manner, and it comprises a large part of the stock. This inventory and appraisalment was produced at the hearing, and, with the original partial inventory of October 28th, was submitted to the examination of complainant; and he, during a recess of several days of the court, made a careful abstract of the two, by which a comparison could be made, and he found and showed by his evidence that the quantity of goods in the inventory and appraisalment made by Rosenbaum on November 23d was much less than was inventoried of the same goods by complainant and defendant on October 28th. From this it is inferable, either that Rosenbaum, in estimating, as he did, number and quantity, was greatly mistaken, or that all the goods were not shown to him. The difference in the prices put on the goods in the two inventories is not so great as in the quantities. In some instances Rosenbaum's prices are as large as the complain-

ant's. It further appears that the inventory of October 28th was left in defendant's possession, and was produced by him at the hearing, and that complainant also left in the store all his old bills of goods previously purchased, — he so swore, and defendant did not deny it, — so that defendant had an opportunity to test the accuracy of the inventory of October 28th; and it is fair to presume that if any false prices of cost price had been made, they would have been discovered and pointed out. Not a particle of evidence was offered tending to prove that complainant was guilty of any misrepresentation as to the quality or quantity of his stock of goods, or that he concealed any facts from defendant, or prevented him from making such examination of the stock as he desired. The parties were strangers, and were dealing at arm's-length. The defendant had had more or less experience, and had a brother-in-law at hand to consult with. It seems to me that the negotiations were carried on in a perfectly fair manner, and without trick or artifice on the complainant's part; and in considering the question of value, it must be borne in mind that the defendant was desirous to buy, and did buy, an established business, with its good-will, and that he made the purchase largely on time, with deferred payments averaging more than a year, without interest, and the security he was to give was not the best, and that complainant was obliged to take a considerable risk. Defendant could not, under such circumstances, expect to buy at the same prices that he would for cash in hand.

Upon a careful examination of the whole case, I think this defense of fraud on the part of the complainant, and of hard bargain, is not at all sustained. On the contrary, I think the bargain was a fair one in all its parts.

The jurisdiction of this court to decree specific performance of contracts for sale of chattels is as well settled as it is for those of the sale of realty, and is based upon the same grounds, namely, the inability of the courts of law to give such remedy. And so the question whether the court will in a particular case exercise its jurisdiction is to be determined upon the same considerations in both cases, the most important being the question whether there is a full, complete, and adequate remedy at law. And the reason why the jurisdiction is seldom exercised over sales of chattels is, that the remedy at law, in such cases, is usually adequate and satisfactory: *Cutting v. Dana*, 25 N. J. Eq. 265, and cases there cited; *Pome-*

roy on Specific Performance, secs. 9-20; Waterman on Specific Performance, secs. 16, 17.

The cases cited by Chancellor Runyon in *Cutting v. Dana*, 25 N. J. Eq. 265, and Professor Pomeroy and Judge Waterman, are mostly, if not all, cases of vendee against vendor, and the language used in the text of the treatises is mainly applicable to such cases. But the principle upon which they go includes the cases of vendor against vendee: Waterman on Specific Performance, sec. 15; Pomeroy on Specific Performance, sec. 6. In our state, *McKnight v. Robbins*, 5 N. J. Eq. 229, and on appeal, page 642, was a case of specific performance of a contract for sale of chattels by vendor against vendee, and has the support of the judgment of Chief Justice Green. The object of that suit was the same as that of the one now in hand, viz., to recover the price of the chattels in specie.

The only question, then, is, Had the complainant in this case such a complete and adequate remedy at law as that this court should decline to exercise its jurisdiction, and give him expressly what he bargained for? It is proper here to remark that when the defendant intends to ask the court not to exercise its jurisdiction for the reason that the remedy at law is sufficiently adequate, he should take the objection in his answer. Ordinarily, unless so taken, it will be deemed to have been waived. The objection to the exercise of the admitted jurisdiction of the court, on the ground that there is an adequate remedy at law, differs from an objection for want of jurisdiction, which may be taken at any time. Here the jurisdiction is indisputable, the only question being whether the court ought to exercise it.

But, looking at the case as if the objection had been taken in time, it is manifest that the usual remedy at law, viz., a suit to recover the balance of the unpaid purchase-money, or its equivalent,—damages for not executing the securities stipulated for,—would not be an adequate remedy, for the reason that the defendant has no property outside of the goods sold, and during the pendency of that suit the complainant would be destitute of any control over or lien upon the stock of goods, and defendant might, before judgment, move them beyond the jurisdiction of the court.

It was suggested, rather than argued, by counsel, that complainant might bring replevin, and recover possession of the goods themselves. Conceding that by voluntarily putting the defendant in possession, and trusting to his promise to execute

the securities at a future hour, complainant did not lose the right to reclaim (which I think more than doubtful), still it seems to me that it is more than probable that a reclamation of possession by means of a replevin would be treated at law as a rescission of the contract, and must be preceded by a repayment or tender of return of the part payment, and an abandonment of all benefit from the contract. Among the numerous cases on this subject, most of which are cited in Corbin's edition of Benjamin on Sales, I have not found any in which, after a part payment and delivery of possession, the vendor was held entitled to reclaim possession, except on the basis of rescission, and except, of course, those cases where, by the express terms of the sale, title was to remain in the vendor, as in *Cole v. Berry*, 42 N. J. L. 308; 36 Am. Rep. 511. The ground of reclamation in such cases is, either that the sale was conditional upon complete payment, or that the goods were obtained by fraud.

Here the vendor put the defendant in possession in the morning, and relied upon his promise to execute the securities in the evening, thus placing himself in the position of being liable to have it alleged against him that he had waived his vendor's lien by putting defendant in possession before payment, and thus bringing himself within the language of Depue, J., in *Cole v. Berry*, 42 N. J. L. 310; 36 Am. Rep. 513: "Payment of the contract price is one of the most usual conditions on which the transfer of title depends. It is generally a condition to be performed simultaneously with delivery. If such be the contract, a waiver of the condition may be presumed from an unconditional delivery, without exacting payment, and in the absence of explanatory proof, the property will vest in the purchaser." See Benjamin on Sales, Corbin's ed., secs. 325, 346, 352, 1125, 1126; *Neil v. Cheves*, 1 Bail. 537.

Further, with regard to the supposed remedy by way of regaining possession of the goods, it is to be remarked that conceding that complainant could have accomplished that at law without a rescission of the contract, and could have retained the part payment, and held the goods as security for the balance, it is plain that the only mode of completing that remedy would have been by selling the goods, in default of the execution by defendant of the required security to pay the balance due; and it is equally plain that by so doing, com-

plainant would have taken the law into his own hands, and done just what he has asked this court to do.

Now, it seems to me that it does not lie in defendant's mouth to complain that complainant has brought him into this court to administer this right under its direction and protection.

There should be a decree that defendant specifically perform by executing and delivering the specified securities.

SPECIFIC PERFORMANCE. — As to the jurisdiction of courts of equity to enforce the specific performance of contracts generally, see note to *Ander-son v. Green*, 23 Am. Dec. 423-431.

SPECIFIC PERFORMANCE. — An agreement to transfer certain shares of stock is one which equity will specifically perform: *Leach v. Fobes*, 11 Gray, 506; 71 Am. Dec. 732. In *Avery v. Ryan*, 74 Wis. 591, however, it was decided that specific performance will not be decreed of a contract to transfer corporate stock whose value can be ascertained, where there is no fiduciary relation between the parties, defendant is not insolvent, and plaintiff has adequate remedy at law without resort to a foreign court.

McVICKAR v. McVICKAR.

[46 NEW JERSEY EQUITY, 490.]

MARRIAGE AND DIVORCE — CRUELTY FROM INTOXICATION AS DESERTION BY HUSBAND. — Where the failure of the husband to provide for the wife, and his persistent and long-continued cruel treatment of her, caused by his voluntary and habitual intoxication, is such as to render her existence miserable, and to actually endanger her life, such treatment amounts to desertion on his part, and if he continues his habits of intoxication for the statutory period after separation, the right of the wife to absolute divorce for his desertion becomes fixed.

MARRIAGE AND DIVORCE — DRUNKENNESS AS CRUELTY. — The voluntary and habitual drunkenness of the husband will not excuse his cruelty to his wife, although the cruelty was the direct result of the drunkenness. Cruelty so caused is ground for divorce.

MARRIAGE AND DIVORCE — DIVORCE FOR DESERTION. — A woman who leaves her husband because it is unsafe for her to cohabit with him, and under such circumstances as to make him the deserter, does not consent to the desertion; and if he does not, before the lapse of the statutory period, amend his habits so as to render it safe for his wife to resume cohabitation, her right to a divorce becomes fixed.

MARRIAGE AND DIVORCE — DIVORCE FOR DESERTION. — Where a husband's treatment of his wife is so cruel and long-continued and persistent as to render separation desertion on his part, and his conduct subsequently is such as to render it unsafe for her to return to him at any time within three years after the separation, her right to divorce then becomes fixed.

MARRIAGE AND DIVORCE — DIVORCE FOR DESERTION. — Where the husband's cruelty is not of such intensity as to amount to desertion, but is

such as will justify his wife in temporarily separating herself from him, it is his duty to personally seek her and ask her to return; and his failure to do this, while he remains passive for many years, manifesting no interest in her welfare or desire to resume marital relations after reforming his habits, constitutes desertion, and entitles the wife to divorce.

John A. Blair, Otto Crouse, and Hodge, for the petitioner.

P. Woodruff, for the defendant.

PITNEY, V. C. Petitioner prays to be divorced from the bonds of matrimony, on the ground of desertion by her husband, the defendant, which she alleges to have occurred in 1868. It is admitted that since that date the parties have lived separately, and the question is as to the character of the separation.

The parties were married in May, 1862, at Ballymena, county Antrim, Ireland, where the parents of both resided. The petitioner was then barely sixteen years old; the defendant about thirty. Her father and brothers were well-to-do people, engaged in trade at Ballymena, and, as I infer, also at Belfast. Defendant was engaged in business as a linen-finisher at Drumona, a village about five miles from Ballymena. They kept house at Drumona from their marriage until March, 1868. The defendant had shortly before that date failed in business, and was penniless. Petitioner's father died in 1863. In the spring of 1863, the friends of the parties on both sides united in making up a purse to send them to New York, and give defendant a chance to make a fresh start there. They arrived in New York in the spring of 1868, with about one thousand dollars in money. By September they were again penniless. Petitioner borrowed of a Mr. Best, in New York, money enough to carry both back to Ireland. They reached Liverpool in September, 1868; petitioner took the night boat to Belfast, gave her husband the little money which remained after paying her fare, and left him at the wharf in Liverpool, since which time they never met until the hearing of the cause. Petitioner went at once to live with her brother, James Morton, at Ballymena, and a few days or weeks afterwards, defendant followed her to Ireland, but did not see her. He remained in Ireland, and in the same neighborhood, for about two years, when he returned to New York. He lived in New York a few years, and then went to Montclair, or rather Caldwell, where he has lived for some fifteen years. Petitioner spent several months with her brother and

other friends in Ireland, England, and Scotland, and then went to France, and afterwards to Geneva, Switzerland, where she has for many years kept a school for young ladies.

The foregoing is an outline of the married lives of the parties, and the question is, whether the causes and circumstances of the separation are such as to make the defendant guilty of "willful, continued, and obstinate desertion for the period of three years" or more.

The contention of the petitioner is, that she was compelled to leave her husband, and to live separate from him, by his utter and complete neglect to provide for her, and his persistent and long-continued cruel treatment of her, by which her existence was rendered extremely miserable and her life actually endangered.

That such treatment of a wife by a husband will amount to desertion on his part is well settled in New Jersey. Chancellor Zabriskie, in *Starkey v. Starkey*, 21 N. J. Eq. 136, says: "In all cases where a husband either actually drives his wife from himself and his house, or by his cruel and abusive treatment compels her to leave it for safety or comfort, it is an abandonment and separation by him." And again, in *Laing v. Laing*, 21 N. J. Eq. 249, he says: "It is a recognized principle, that when a husband treats his wife with such cruelty or violence that she is obliged to leave him for safety, or to avoid personal injury, this compulsory flight amounts to a desertion by him; and if he does not seek his wife, and try to persuade her to return, with promises of amendment, that such absence, if continued for the requisite time, is a willful and obstinate desertion on his part." And further on: "To convert a leaving by the wife into a desertion by the husband, she must go away for her own safety, and to protect herself from his violence."

This language of Chancellor Zabriskie is repeated and adopted by Chancellor Runyon in *Sandford v. Sandford*, 32 N. J. Eq. 421. And Vice-Chancellor Van Fleet, in *Skean v. Skean*, 33 N. J. Eq. 148, 151, says: "The husband may drive his wife away, or he may treat her so brutally as to compel her to flee for safety, or his conduct may be so cruel and malignant as to show that he means to force her away. If a wife, for either of these causes, separates herself from her husband, and he allows her to remain away for the statutory period, without professing sorrow for his violations of conjugal duty and promising to amend his conduct, and asking her to return, he,

in the eye of the law, is the deserter, and she has a right to ask for a dissolution of the marriage tie." And again, in *Weigand v. Weigand*, 41 N. J. Eq. 202, 208, he says: "A husband is guilty of abandonment when he compels his wife, by cruel and abusive treatment, to leave him. If, in consequence of his conduct, she is compelled to leave his house, either to preserve her honor and self-respect or to secure safety, he is the cause of the separation, and must be adjudged to be the wrong-doer." And see *Marker v. Marker*, 11 N. J. Eq. 256.

It is not, in my judgment, a necessary ingredient in this canon that the husband should entertain, in connection with his acts of cruelty, any settled purpose to drive his wife from him. It is enough if such is the natural consequence of his acts. Nor is the rule so laid down open to the criticism that it is, in effect, giving the wife a remedy against her husband for extreme cruelty greater than the statute authorizes, viz., divorce *a vinculo matrimonii*, instead of *a mensa et thoro*. By the twentieth section of the divorce act, if the husband deserts his wife, she may sue him at once for maintenance and support, while if she waits three years, and his desertion continues, she may procure an absolute divorce from him. Here is clearly something like a choice of remedies on the part of the wife. A remedy by suit for maintenance may be, and often is, of no value to her, owing to her husband's worthlessness, and hence she may accept the situation, and if her husband's separation continues for the requisite period, obtain an absolute divorce. So with the remedy of a divorce *a mensa et thoro* on the ground of extreme cruelty; it is generally of no value to the wife in a case where the husband has no estate and no earning capacity; and if the husband's conduct amounts to desertion, and is continued for the statutory period, there is no more reason in the one case than the other why the wife should not have the higher remedy of an absolute divorce.

Bearing the canon above cited in mind, I will proceed to examine the testimony in this case. There is very little conflict in it. The husband did indeed deny that he had ever consciously ill-treated his wife, but close observation of the parties while on the stand satisfies me that she is reliable in her statement. Her story is as follows: From the start her husband was a brutal drunkard, and so continued during the whole period of their cohabitation. She had heard before she married him that he had been drunk on one or two occasions, but his sister denied it, and declared that he was not at all

dissipated in his habits. Petitioner was a mere child, without sufficient prudence to make close inquiry, and I do not think she can or ought to be placed in the position of one who knowingly and voluntarily marries a depraved or dissolute spouse. In addition to his disposition to drink, he appears to have had a brutal and unfeeling temperament, which was aggravated by frequent intoxication, so that he habitually kicked and beat his wife, sometimes using a cane or fire-shovel or poker. When he did this he was sometimes drunk and sometimes sober, but more frequently drunk. She declares that she was frequently seriously bruised, and that she bears the marks of his violence to this day. On one occasion, in a boarding-house in New York, in very warm weather, he locked himself and her in their room, which was at the top of the house, hid the key in his night-dress, under his arm, set all the gas-jets burning, and laid down and went to sleep, or pretended to do so. The wife remained thus incarcerated for a whole night and a part of the day, suffering intensely from heat and mosquitoes; finally watching the opportunity when she thought her husband was asleep, she extracted the key quietly from its place of concealment, and left the room. Her husband observed her movement, and following her, seized her as she turned to descend the stairs, and lifted her by one of her arms up over the banister, in what appears to have been an attempt to drag her back to their room. She screamed, for the first time, as she says, throughout all her sufferings, and some of the boarders came and rescued her. On this occasion she says he was sober. She denies that she was cross or quarrelsome, or that she ever at all, or in any wise or degree, provoked or scolded her husband, or was in the least degree responsible for his brutal conduct towards her; and in this respect she is not only not contradicted but positively corroborated by him. She declares that she did all she could to hide her husband's shame and her own sufferings, and made unceasing efforts to wean him from his brutal habits. He frankly admits the truth of her statement in this respect.

The accuracy of her picture of her married life, with all its hideous horror, is strongly corroborated by the evidence of several New York business men, who testified as to his habits and conduct for one or two years after he returned to New York, in 1870. These gentlemen, who were then young men, were brought into daily contact with defendant during the period just mentioned. They show him to be not only a

drunkard, but possessed of a temper which exhibited itself in acts of violence towards those who were brought into contact with him. Upon the least provocation, he would throw a ruler, paper-weight, ink-stand, or other object at the head of the offender.

Upon a careful review of all the evidence bearing on the subject, I am satisfied that the petitioner was entirely justified, under the canon above set forth, in separating herself from her husband at the time and in the manner she did, and that her life would have been in danger from his violence if she had continued to live with him, even if he had been able, which he was not, to make the least provision for her support.

On this part of the case I have no difficulty whatever.

Further, the evidence satisfies me that the defendant continued to be the same dangerous man for at least three years after the separation. He claims that he has reformed, and has overcome the passion for drink, and he fixes the date of his reformation as fifteen or sixteen years ago. Taking his own statement in this respect, there still remain at least three years from the separation that he was unreformed, and a dangerous companion for a female, and this view is fully corroborated by the witnesses who knew him during the first two years that he lived in New York. The witness who brought his history down to the latest date showed him a mere tramp, picking up a few cents for odd jobs, and spending it all for drink.

No evidence beside his own oath was produced in support of his allegation of reformation, except that his appearance while on the stand was that of a man not addicted to intoxication or dissipation. The fact that he did finally overcome his passion, even after indulging it for so long a time, is important. It shows he never did have what is called "rum disease"; he never reached the point where he could not control himself; and of course what he accomplished in 1873 or 1874 might have been done much earlier in 1865 or 1868; and therefore I am driven to the conclusion that the conduct of the defendant during all this time was willful. He got drunk because he loved to do so, and willingly gratified his desire. Conceding that all the ill-treatment of his wife was the direct result of drink, and that he was at the time unconscious of his brutal and cruel treatment of her, still she swears (and I believe her) that when he became sober she told him how

he had behaved, and begged him to refrain. If, with such knowledge of the results of his intoxication, and with the power to refrain, he still persisted in indulging his desires, he must, in my judgment, according to perfectly well-settled principles, be held fully responsible for the results. Drunkenness, in such case, can be held no excuse, and does not qualify the cruelty. The court of errors and appeals, in *Smith v. Smith*, 40 N. J. Eq. 566, held that an insane delusion was not an excuse for cruelty, although the cruelty was the direct offspring of the delusion. The argument from insanity to drunkenness is *a fortiori*, since one is under the control of the offender and the other is not.

It is true that habitual drunkenness is not, in New Jersey, a ground for even a limited divorce, but extreme cruelty is such ground, even though it be caused by drunkenness; and it is no answer to petitioner's position to say that the result of granting a divorce in such case is, in substance, a new cause for divorce. Chancellor Zabriskie was not unmindful of this argument in laying down the canon in *Laing v. Laing*, 21 N. J. Eq. 249, for he says, in immediate connection therewith: "The causes of divorce in this state are ample, and I feel no inclination to increase or extend them by judicial construction"; and in that case refused the divorce under circumstances something like those now under consideration. But he put it on the distinct ground that the acts of personal violence in that case were not sufficiently frequent, habitual, and severe to be the ground of judicial separation, and that they were condoned. It is a question of degree, to be determined upon the facts of each case. I think that the acts of cruelty so often repeated, as proven in this case, would have induced Chancellor Zabriskie, if they had existed in *Laing v. Laing*, 21 N. J. Eq. 249, to have there granted the divorce.

But there is another circumstance, or set of circumstances, in the present case, that are claimed materially to modify the defendant's conduct and avert its logical results. When the husband and wife separated at the dock in Liverpool for the last time, the parting was friendly. They evidently expected to meet again. She had not then, apparently, abandoned all hope of his reformation, or expectation of again living with him. Apparently she had no settled thoughts on the subject or plans for the future. She realized her sufferings and felt her wrongs, but knew nothing of her rights or what remedy she could command. After reaching her brother's house, in

Ballymena, she wrote her husband two or three friendly, if not affectionate, letters, but very shortly she was induced to disclose her sufferings to her brother. He at once insisted that she should not again expose herself to the danger of living with her husband. By his advice, she wrote her husband the following letter, which he received and has preserved all these years. It is without date, but was evidently written in the fall of 1868: —

“BROOKVILLE, Monday.

“Sir, — I write this to inform you that it is my desire and determination to live apart from you from henceforth, in which I find the law will support me. I have not formed this resolution hastily, nor have I been influenced in the matter by any one. I wrote from America to my brother Nathaniel, stating that if I could manage to get home in safety, nothing could persuade me to live with you. I have suffered too much at your hands to again place myself in your power. With regard to the two letters I wrote you to Liverpool, I wrote them to fulfill a promise given to you when parting, and given for the purpose of getting a quiet riddance; and as to writing you to remain in England, I can only say that I was so disturbed and harassed by all that had occurred, that I really did not know how to treat you. I received all your letters duly, and did not reply to any of them, as I was still expecting to hear of your departure, which you mentioned as likely to happen. I am quite willing to have a legal separation, but a meeting you need not expect. There are some things of yours here, which my brother will either send to John McVicar, or Mr. Mantell, as you may direct him. I trust you will rest satisfied with the evil you have already caused, and for the time to come leave me in peace. Wishing you brighter prospects. I am

MATILDA McVICKAR.”

After receiving it he wrote her repeatedly and got no reply. She received none of his letters. It is probable they were intercepted by her brother. Defendant suspected the interception, and wrote her brother about it, without success. He remained in Ireland, without seeing or communicating with his wife, other than as above stated, for about two years, when he returned to New York. In the mean time she set about finding some means of support, and after recovering her health, which appears to have been considerably shattered, went to France and entered a ladies' school as assistant, to learn the language and finish her general education. During

her stay in Great Britain, and afterwards, as often as opportunity offered, she made inquiry after her husband, and all she heard was, that he was a miserable drunkard. She never heard of his reformation, and for many years heard nothing, and supposed him to be dead.

For the first year or two after defendant came to New York, he said he made frequent attempts to communicate with his wife, through Mr. Best and others, but without success. He said he understood her brothers resisted all his attempts. Petitioner swears that none of his communications or messages reached her. But defendant admits that after his alleged reformation, he made no further attempt to reach his wife; did not write to her, or take any means to inform her of the change in his habits. He says he thought it would be useless to make further efforts to that end. When pressed to explain why he did not do so, he put himself on the attempt to communicate with her in 1868, and her letter of that year, above set forth. But in point of fact he did not, at the time, interpret that letter as a final dismissal, for he swears to frequent efforts to communicate with her afterwards, both while in Ireland and for the first year or so after his return to New York. According to his statement, it was only after he had reformed that his efforts ceased. The evidence satisfies me that defendant could easily have reached his wife had he chosen to do so. He is a man of considerable education, intelligence, and business capacity. He had brothers and friends living in the neighborhood of his wife's friends, in Ireland. He could have gone there, and demonstrated to them and the world that he had reformed, and that it was safe and proper for his wife to resume cohabitation with him. It was his duty to do this, unless he was justified in considering her letter of 1868 as a final dismissal, irrespective of a change in his habits. And this brings us to the consideration of the effect upon the rights of the parties of the letter in question.

In order to give the deserted spouse a right to a divorce on account of the desertion, it must have been against the wish and consent of such deserted spouse. This is the well-settled rule. But it is manifest, from all the cases, and especially from *Sargent v. Sargent*, 36 N. J. Eq. 644, reversing the same case in 33 N. J. Eq. 204, that the disposition of the court is not to consider the conduct and words of the wife very strongly against her in such cases: *Cornish v. Cornish*, 23 N. J. Eq. 208; *Bowlby v. Bowlby*, 25 N. J. Eq. 406, 570.

The husband, in this case, must have understood the letter as justifying the separation, on the ground of his cruelty to her. Read in the light of the evidence in this case, it said, in effect: I have lived with you and suffered from your cruelty for six long years and more; I have been a faithful, loving wife, and have tried my best to induce you to refrain from drink, and be a kind husband; I have failed, and have no hope that you will ever reform; therefore I cannot see you, or again trust myself in your power. Now, clearly, under the canon above cited, a woman who leaves her husband because it is unsafe for her to cohabit with him, and under such circumstances as to make him, and not her, the deserter, does not consent to such desertion. To hold the affirmative of such proposition is to destroy the canon itself. Hence it follows that if the husband does not, before the lapse of the statutory period, so amend his ways as to render it safe for his wife to resume cohabitation, her right to a divorce becomes fixed. The burden of proving such reformation is on the offending party. I think the defendant has failed to overcome the burden so resting on him. I am very far from satisfied that at any time within three years from September, 1868, it would have been safe for his wife to live with him.

But conceding that petitioner's rights did not become fixed before defendant's alleged reformation, the question still remains as to the effect of his subsequent conduct. He says he made no effort to regain her esteem and confidence, because he considered her letter of 1868 as a final dismissal. I have already shown that he did not at the time so consider it, but claims to have made repeated efforts to see and communicate with her, within the ensuing three years; and I am well satisfied that he failed in those attempts simply and solely because those who surrounded his wife, and those whom he employed as intercessors, were well satisfied that he had not reformed, and that they would be inflicting an injury on the wife by bringing them together. I have no doubt Mr. Best may have promised him to make efforts, on his visits to Ireland, to bring about a reunion, but I do not believe that he really endeavored to do so. The hearing was adjourned in order to enable the petitioner to produce Mr. Best as a witness, but she did not do so, and I am satisfied that it was not her fault that he was not produced. I am further satisfied, from all the circumstances, that if defendant had been able to satisfy his

wife's friends that he was reformed, he could have gained access to her. Still, if the letter in question should properly be construed as a final dismissal, regardless of any change in his habits, then the petitioner must be considered as consenting to the separation, and cannot ask for a decree by reason of his failure to return after his reformation. But I think the document is not properly subject to such construction. It would, perhaps, have been more satisfactory if she had said, in so many words, that when he reformed and made himself a safe person for a woman to live with, she would resume cohabitation. But I do not think the omission of such expression alters the rights of the parties. The fault of the husband was his cruel treatment of his wife, caused, from his own stand-point, by his passion for drink. It was plainly his duty, notwithstanding that letter, if he wished to alter his position towards his wife, to remove the fault by refraining from drink and by reformation, and to demonstrate to his wife that there was reasonable ground to believe that his reformation was permanent, so that it would be safe for her to resume cohabitation with him.

In this view I am supported, in addition to the cases above cited, by Vice-Chancellor Bird's opinion in *Grant v. Grant*, 36 N. J. Eq. 502. There a wife left her husband on account of extreme cruelty on his part. After the statutory period of three years, he sued her for divorce on the ground of desertion. She set up, in answer, that she had not deserted him, but that she was justified in leaving him on account of his cruelty. It appeared that shortly after the separation, he promised to behave better in the future, and begged her to come back. She declined, in a letter couched in language expressing quite as strong a determination not to live with him or see him again as the letter of the petitioner in this case. The husband, in the case above cited, made no further effort to induce his wife to return to him. The learned vice-chancellor held that his conduct in that respect was not satisfactory, and that he ought not to have considered his wife's letter as final, but should have made further efforts to induce her to return, and that his conduct, under the circumstances, amounted to a consent to the continuance of the separation.

I come, therefore, to the conclusion that the petitioner is entitled to her divorce, on two grounds: 1. That she was entirely justified in separating herself from her husband; that his treatment of her was so cruel and so long continued and

persistent, as to render the separation desertion on his part, under the canon above laid down, and that it would have been unsafe for her to return to him at any time within three years after the separation, and that her right to a divorce then became fixed. 2. If, however, the husband's cruelty was not of such intensity as to amount to desertion, still it was such as to justify the wife in temporarily separating herself from him, and it was his duty to seek a return. This he did not do, but for many years remained entirely passive, manifesting no interest in her welfare or desire to resume marital relations. This, under the circumstances, constituted desertion, and entitles the wife to a decree.

MARRIAGE AND DIVORCE — CRUELTY AS GROUND FOR DIVORCE. — As to what is habitual drunkenness, and whether it is a ground for divorce for cruelty, see *Youngs v. Youngs*, 130 Ill. 230; 17 Am. St. Rep. 313, and note; *Shutt v. Shutt*, 71 Md. 193; 17 Am. St. Rep. 519, and note; *Lewis v. Lewis*, 75 Iowa, 200. An allegation that defendant was habitually drunk to such a degree as to reasonably inflict great mental anguish upon plaintiff sufficiently sets out the degree of intemperance necessary as a ground for divorce: *Forney v. Forney*, 80 Cal. 528. Injuries inflicted by cruelty comprise mental injuries as well as bodily: *Williams v. Williams*, 23 Fla. 324.

MARRIAGE AND DIVORCE — ABANDONMENT OR DESERTION AS GROUND FOR DIVORCE. — Desertion is the voluntary separation of one of the parties from the other, or the voluntary refusal to again cohabit, without justification, through the consent or wrongful conduct of the other: *Sisemore v. Sisemore*, 17 Or. 542. For one of the spouses to leave the other on account of cruelty such as will entitle him or her to a divorce is not such a desertion as will entitle the other to a decree of divorce: *Doolittle v. Doolittle*, 78 Iowa, 691; *Kibel v. Kibel*, 25 Neb. 256; *Detrick's Appeals*, 117 Pa. St. 452. To authorize a decree of divorce in favor of the wife for desertion or cruelty, it must appear that the husband abandoned his family, or maliciously turned his wife out of doors, or endangered her life by cruelty, or offered such indignities to her person as rendered her life a burden: *Jackson v. Jackson*, 105 N. C. 433. Where a wife, having deserted her husband without legal excuse, thereafter conducts herself in such a manner as to justify her husband in seeking a divorce on the ground of adultery, the pendency of such action, even though she is not guilty, will not bar another action at the proper time for a divorce for desertion: *Wagner v. Wagner*, 39 Minn. 394. A wife cannot secure a divorce on the ground of desertion, where it appears that the husband left to work in another city, and wrote affectionate letters regularly to his wife; that the wife lived with her parents; that the husband failed to contribute to the support of his family, not from indifference, but from an inability consequent upon business reverses: *Bruner v. Bruner*, 70 Md. 105. Although a man has been deserted by his wife for seven years, he may, by committing adultery, preclude himself from securing a divorce on the ground of such desertion: *Whippen v. Whippen*, 147 Mass. 294. The husband decides where the matrimonial residence must be, and ordinarily, the wife, refusing to go with

him, is guilty of desertion: *Haymond v. Haymond*, 74 Tex. 414. No divorce can be decreed for abandonment, where it appears that the husband and wife cohabited together as such about the time of the institution of the suit: *Dunn v. Dunn*, 26 Neb. 136.

MARRIAGE AND DIVORCE—FAILURE TO WORK AS GROUND FOR DIVORCE.
—The fact that a husband is able to work, has plenty of work offered him, but refuses to work and support his wife, is no valid ground for divorce under the statutes of Vermont: *Jewett v. Jewett*, 61 Vt. 370; *Oilley v. Oilley*, 61 Vt. 542.

CASES
IN THE
COURT OF ERRORS AND APPEALS
OF
NEW JERSEY.

BASSETT v. SHOEMAKER.

[46 NEW JERSEY EQUITY, 532.]

TRUSTS AND TRUSTEES — SALE BY TRUSTEE TO HIS WIFE. — Where a trustee sells the trust estate to one who by previous agreement purchases for the wife of the trustee, the sale will be set aside on the application of a *cestui que trust*, nor is evidence that the sale was fair and for the best price obtainable admissible.

TRUSTS AND TRUSTEES — PURCHASE BY TRUSTEE'S WIFE AT HIS SALE. — Where a husband sells as trustee, his wife is excluded from purchasing at the sale directly from him. If she desires to become a purchaser, she must apply to the court and obtain an order that the sale be conducted by and under the supervision of a master, who, in case she purchases, will convey in due form to her.

W. E. Potter, for the appellants.

A. Stephany, for the respondent.

VAN SYCKEL, J. The facts of this case are concisely stated by the vice-chancellor as follows: The bill is filed by one of the beneficiaries under the will of David Shoemaker, of Pedricktown, Salem County, and asks the court to set aside the sale and conveyance by Albert Bassett, executor of the will, of a farm of the testator in said county. The testator left two children, viz., David Shoemaker and Mrs. Sarah E. Bassett, wife of the executor, and the children of a deceased son, Isaac, of whom the complainant is one, and two of whom are infants. By his will testator directed his executor to sell his real estate, including the said farm, and to divide the proceeds among his children and grandchildren. The executor advertised the farm in question for sale, at Pedricktown, on

November 28, 1888. It had been the home of testator, and was occupied at the time of the sale by Mrs. Mary Shoemaker, the widow of his deceased son, Isaac. At the sale the only persons actually bidding were Mrs. Bassett, one of the defendants, and Mrs. Mary Shoemaker. The former bid the farm up to \$102 per acre, and Mrs. Shoemaker bid \$102.50, and it was struck off to her, and she signed the conditions of sale, and gave her note for the required percentage. She did not, however, comply with the terms of the sale, and without, so far as it appears, any demand to enforce such compliance, the executor readvertised the farm for sale, at the court-house in Salem, on January 26, 1889. At this sale Mrs. Bassett employed the defendant Fogg to bid for her, and the property was struck off to him at the only bid made, of fifty dollars per acre. The deed was made and delivered on February 8, 1889, to Fogg, who, on the same day, conveyed by deed to Mrs. Bassett, who paid the purchase-money directly to her husband. All of these facts were set forth in the answer to the bill.

The court below set aside the sale, refusing to permit Mrs. Bassett to produce evidence to show that the sale was a fair one, and for the best price that could be obtained.

It is insisted on the part of the appellant that there was error in excluding this evidence; that since the passage of the married woman's act, tenancy by the curtesy initiate being abolished, the husband had no present interest in the real estate of his wife, and that therefore she, being a beneficiary under the will, could not be denied the right to purchase in protection of her own interest.

The leading case of *Davous v. Fanning*, 2 Johns. Ch. 251, presents facts substantially like the case before us. Chancellor Kent held that other parties interested were entitled to come in and set aside the sale to the wife as a matter of course. He says: "However innocent the purchase may be in the given case, it is poisonous in its consequences. The *cestui que trust* is not bound to prove, nor is the court bound to judge, that the trustee has made a bargain advantageous to himself. The fact may be so, and yet the party not have it in his power distinctly and clearly to show it. There may be fraud, as Lord Hardwicke observed, and the party not be able to prove it. It is to guard against this uncertainty and hazard of abuse, and to remove the trustee from temptation, that the rule does and will permit the *cestui que trust* to come, at his own op-

tion, and without showing actual injury, and insist upon having the experiment of another sale. This is a remedy which goes deep, and touches the very root of the evil."

This rule has been fully adopted into the law of this state. The incapacity of the trustee to become a purchaser at his own sale rests upon the ground of public policy. It is wholly immaterial whether the property brings its full value: *Culver v. Culver*, 11 N. J. Eq. 215; *Mulford v. Bowen*, 9 N. J. Eq. 797.

The exclusion of the wife as a purchaser, where the husband sells as a trustee, is not so much for the reason that he may subsequently become entitled to some interest in her lands, as on account of the unity which exists between them in the marriage relation. The case falls clearly within the spirit of the principle which excludes the husband himself.

In *Romaine v. Hendrickson*, 27 N. J. Eq. 162, affirmed 28 N. J. Eq. 275, Vice-Chancellor Van Fleet says: "So jealous is the law of the interest of the *cestui que trust*, that it will not tolerate the slightest antagonism on the part of the trustee. The object of the rule is to prevent the trustee from using his information and power to the prejudice of the *cestui que trust*."

In my opinion, therefore, the decree of the court below setting aside the sale should be affirmed.

The prayer of the complainants' bill is, that the said sale be set aside. The decree below is not only that the sale be set aside, but also that one of the special masters of the court of chancery shall sell the said farm. In this respect the decree was erroneous, and should be set aside. The property should be resold by the executor in pursuance of the directions of the will of the testator. If the wife desires the privilege of becoming a purchaser at the sale, the proper practice will be to apply to the court of chancery for leave to buy, and have the resale conducted by and under the supervision of a master to be appointed by that court. If the property shall be struck off to the wife, the executor will execute a deed to the master, who will convey in due form to the wife.

TRUSTS AND TRUSTEES. — A trustee cannot become the purchaser of the trust estate: *Note to Gardner v. Ogden*, 78 Am. Dec. 211. The husband and wife at common law are treated as one, the husband being that one: *Mackinley v. Gregor*, 3 Whart. 369; 31 Am. Dec. 523. A trustee will not be allowed to make profit out of the trust estate; and whatever profit may arise belongs to the owner of the trust fund, not to its custodian: *Baker's Appeal*, 120 Pa. St. 33; *Hughes v. Hughes*, 87 Ala. 652; but the court will not, at the instance of the beneficiary, set aside a purchase by the trustee at a sale

ordered by the court, where trustee was individually interested, and purchased in good faith, paying a fair price: *Anderson v. Butler*, 31 S. C. 183. But ordinarily a trustee purchasing property with trust funds takes title in trust for the beneficiary: *Phillips v. Overfield*, 100 Mo. 466. In *Bohn v. Davis*, 75 Tex. 24, it was decided that a trustee, to whom lands are conveyed in trust to secure his own debt, as well as the debts of others, may purchase at his own sale.

TRUSTEES' SALES, WHEN VOID OR VOIDABLE: See note to *Tyler v. Herring*, ante, p. 263.

SCHWENK v. WYCKOFF.

[46 NEW JERSEY EQUITY, 560.]

ASSIGNMENT. — **UNEARNED PAY** of a retired officer of the United States army is not assignable. An assignment thereof is against public policy and void.

Gilbert Collins and F. Frambach, for the appellant.

Frank Bergen, for the respondent.

REED, J. The right of the respondent, who was the complainant below, to the relief for which she prays, rests upon an assignment made to her husband by the defendant. The subject-matter which the assignment was supposed to operate upon was the unearned pay of the defendant, to become due to him as a retired officer of the United States army.

In the consideration of the cause, we meet at the outset a difficulty which lies at the root of the complainant's case. It exists in the shape of an objection interposed by the defendant, that this assignment purports to transfer a chose in action belonging to a class which are not assignable, or what, in effect, produces the same result, the assignment of which the courts will not enforce or recognize.

The rule is established in the English courts that the unearned salary or emolument of an officer, which may become payable during his life, is incapable of assignment.

This restriction upon the general power to dispose of rights having a potential existence is put upon ground that the recognition of such assignments would operate prejudicially upon the public service. The considerations which led to this judicial result were, in substance, the following: It was apparent that the salary or remuneration incident to a public office, as a rule, was essential to a decent and comfortable support of the incumbent. If the officer should be deprived of this support, there would arise a hazard of his being driven to an

inappropriate meanness of living, of his being harassed by the worry of straitened circumstances and tempted to engage in unofficial labor, and of the likelihood of his falling off in that official interest and vigilance which the expectation of pay keeps alive. It was because of these probable consequences, that the courts refused to countenance any act or proceeding which might result in stripping the officer of his anticipated reward.

The cases in which this question has been mooted, and the foregoing rule established, in the English courts, are the following: *Flarty v. Odum*, 3 Term Rep. 681; *Barwick v. Reed*, 1 H. Black. 627; *Arbuckle v. Cowtan*, 3 Bos. & P. 328; *Davis v. Marlborough*, 1 Swanst. 79; *Lidderdale v. Montrose*, 4 Term Rep. 248; *Stone v. Lidderdale*, 2 Anstr. 533; *Wells v. Foster*, 8 Mees. & W. 149; *Palmer v. Bate*, 2 Brod. & B. 673.

In the case of *Flarty v. Odum*, 3 Term Rep. 681, it was held by the court of king's bench that this rule was applicable to the assignment of half-pay by an officer of the British army. It was ruled that future accruing payments did not pass to an assignee appointed under proceedings against an insolvent officer, taken for the benefit of his creditors. Afterward, in the case of *Lidderdale v. Duke of Montrose*, 4 Term Rep. 248, the validity of a voluntary assignment of the half-pay of an officer came before the same court, and it was held that there was no distinction to be made between a voluntary assignment and an assignment, as in the last-mentioned case, under the insolvent debtor's act, and so the voluntary assignment was also held to be void. The same dispute, under the name of *Stone v. Lidderdale*, 2 Anstr. 533, was shifted into the court of exchequer, and by that court it was remarked that half-pay was granted for the purpose of keeping experienced officers in such a situation as not to be compelled to turn themselves to other pursuits, or to be by other circumstances reduced to extreme poverty. The assignment was therefore held to be void. Since the decision of these causes, the nullity of an assignment of unearned half-pay by an officer has been repeatedly recognized. The remarks of Lord Alvanley in *Arbuckle v. Cowtan*, 3 Bos. & P. 328, and of Baron Park in *Wells v. Foster*, 8 Mees. & W. 149, display an understanding in the English courts that by the case of *Flarty v. Odum*, 3 Term Rep. 681, this question had been definitely set at rest.

In this country there are two cases in which the assignment

of a portion of a salary to become due has been held valid. One case is *Brackett v. Blake*, 7 Met. 335, 41 Am. Dec. 442, in which case it was held that the unearned salary of a city marshal was capable of assignment. It is quite remarkable that the only question discussed in the opinion of Chief Justice Shaw in that case was whether the anticipated salary was such a possibility, coupled with an interest, as to be capable of assignment. Upon the court's concluding that it was such an interest, the assignment was sustained, without a word in respect to the point raised in the brief of counsel, that the assignment was opposed to public policy. This question seems to have been entirely overlooked in the decision of that case. There are two subsequent cases in Massachusetts sometimes cited as sustaining the same doctrine. But both these cases, namely, *Mulhall v. Quinn*, 1 Gray, 105, 41 Am. Dec. 414, and *Macomber v. Doane*, 2 Allen, 541, as decided, involve only the question of the assignability of wages to become due upon contracts for services rendered. The second and only other case in which the assignment of the prospective pay of a public officer has been the subject of judicial approval is that of *State Bank v. Hastings*, 15 Wis. 78. This case involved the assignment of the future salary of a judge. In delivering the opinion, the judge remarked that it had not been contended that the doctrine of the English cases, holding that assignments of the pay of officers in the public service, judges' salaries, pensions, etc., were void, was applicable to the condition of society or to the principles of law or public policy of this country. The soundness of the rule laid down by the English cases, however, was not impugned. Nor was it explained in what way the propriety of supporting this rule of public policy ceased under our political or judicial system. Nor does the possibility of any rational explanation seem clear. The object of the rule in both countries is to secure the most efficient service to the public by those who are appointed or elected to perform public duties. So long as there are public officers who are remunerated for their services, the same conditions exist in both countries which render the stripping of such officer of his expectation of pay impolitic. In respect to this general rule of policy, therefore, no solid discrimination can be made between the political situation of this country and that in which the rule was first adopted. This was the view taken by the court of appeals of the state of New York in the case of *Bliss v.*

Lawrence, 58 N. Y. 442, 17 Am. Rep. 273, after a thorough review of the English and American cases by Judge Johnson. This has become a leading case in this country, and the doctrine announced by it—namely, that the assignment by a public officer of the future salary of his office is contrary to public policy and void—has been followed in this country in the cases of *Bangs v. Dunn*, 66 Cal. 72; *Schloss v. Hewlett*, 81 Ala. 266; *Beal v. McVicker*, 8 Mo. App. 202.

Involving the same principle is the case of *Field v. Chipley*, 79 Ky. 260; 42 Am. Rep. 215.

The foregoing doctrine in respect to the non-assignability of unearned official pay may be regarded as settled in this country, as it is in England, by the great weight of reason and authority. Nor is there any difference between the position of a retired army officer in this country and those officers in respect to whose pay the English court were ruling. The officer here, as well as there, although retired from actual campaigning, is still subject to military orders. By the federal statute, he is liable to be assigned to officer soldiers' homes, and to instruct in military institutes: R. S., secs. 1256, 1259, 4816.

He stands, therefore, upon the footing of an officer owing service to the public when called upon for its rendition, and the rule announced protects his pay from himself and his creditors until he earns it.

The decree below must be reversed.

ASSIGNMENT, WHAT IS SUBJECT TO. — As to the validity of an assignment of unearned compensation or wages of public officers and agents, see note to *Field v. Mayor*, 57 Am. Dec. 440. An assignment of the salary of a public officer is void as against public policy: *Bass v. Lawrence*, 58 N. Y. 442; 17 Am. Rep. 273.

CASES
IN THE
COURT OF ERRORS AND APPEALS
OF
NEW JERSEY.

**DELAWARE, LACKAWANNA, AND WESTERN RAILROAD
COMPANY v. TRAUTWEIN.**

[32 NEW JERSEY LAW, 169.]

COMMON CARRIERS — DUTY TO SUNDAY TRAVELERS. — A railroad company, having accepted a passenger, is under obligation to take due and reasonable care for his safety, and such obligation arises by implication of law, independent of contract. Therefore a passenger traveling on Sunday, in violation of law, is not precluded from recovering for an injury arising from the carrier's negligence, when such violation of law was merely a condition and not a contributory cause of the injury. In such case the passenger need not rely on the contract, which was illegal.

COMMON CARRIER — DUTY TO PROVIDE SAFE MEANS OF ACCESS TO AND FROM DEPOT. — The duty of a railroad company as a carrier of passengers does not end when the passenger is safely carried to the place of his destination. The company must also provide safe means of access to and from its station for his use. He has the right to assume that the means of access provided are reasonably safe. If there are two ways, one of which is faulty in construction and repair, and it has been recognized and assented to by the company as a means for the entrance and exit of passengers, an unwarned passenger using it, and injured by its faulty condition, is entitled to recover, although the other way, which he might have used, was safer. It is entirely immaterial who built or maintained the defective way.

Bedle, Muirheid, and Magie, for the plaintiffs in error.

Leon Abbett and William F. Abbett, for the defendant in error.

DEPUE, J. Emma Trautwein, the defendant in error, on Sunday, the 11th of September, 1887, was a passenger on a train of the Delaware, Lackawanna, and Western Railroad Company, from New York City to Lyndhurst, New Jersey. She took passage in the company's train, leaving New York

at nine o'clock in the evening, and reached Lyndhurst about 9:35, P. M. She alighted from the train, and in leaving the station to reach the street, fell over some railroad ties, and received injuries for which this suit was brought. On a verdict for the plaintiff below, and judgment thereon, this writ of error was brought, and errors assigned upon the rulings of the trial judge.

The act concerning vice and immorality provides that no traveling, worldly employment or business, ordinary or servile labor or work, either upon land or water (works of necessity and charity excepted), shall be done, performed, or practiced by any person or persons within this state on Sunday. The penalty prescribed for violating this statute is the forfeiture of one dollar for every such offense, to be recovered upon conviction, and paid for the use of the poor of the township in which the offense was committed: Rev., p. 1227, sec. 1. The section contains a proviso that it should be lawful for any railroad company in the state to run one passenger train each way over its road on Sunday for the accommodation of the citizens of the state. This proviso has the effect, not only to give to the company a right to run the specified trains on Sunday, but also confers the right upon the citizen to use such trains for ordinary travel: *Smith v. New York etc. R. R. Co.*, 46 N. J. L. 7. As between the company and a passenger on its train, it would seem that the latter would have the right to assume that the train on which he is received as a passenger is the train run under the protection of the proviso, whatever effect the duplication of trains might have in subjecting the company to the penalty. There is also some evidence that the purpose of the plaintiff in going to New York on that day was to obtain from a physician a prescription, and get medicine for her mother,—a purpose that would probably exempt the plaintiff from the penalty prescribed by the act. But an instruction to the jury put on record in the bill of exceptions put the plaintiff's case on a broader ground. The trial judge assumed that the company was running this train in violation of the statute, and that the plaintiff was also traveling in violation of the statute, and instructed the jury that these circumstances did not debar the plaintiff of her right to recover. If this proposition be sound, it will not be necessary to consider the rulings of the trial judge in construing the proviso, and with respect to the purpose of the plaintiff's journey on that day or her right to recover.

In Massachusetts, Maine, and Vermont, it has been held adversely to the legal proposition adopted by the trial judge. In the federal courts, and in the courts of other sister states, the decisions have been in accordance with the ruling of the trial judge.

A contract to carry, made on Sunday, or to be performed on Sunday, is, by force of the statute, illegal and void. No action could be maintained for the breach of such a contract, nor for services performed under it, where the right of action rests exclusively upon a contract, express or implied: *Reeves v. Butcher*, 31 N. J. L. 224. It is also clear that a plaintiff will fail where, to make a cause of action, he is compelled to rely upon an illegal contract. But the duty of persons engaged in these public employments to safely and securely carry is independent of contract. It is a duty imposed by law from considerations of public policy, and arises from the fact that persons or property are received in the course of the business of such employments: *Marshall v. York, Newcastle, and Berwick R. R. Co.*, 11 Com. B. 655; *Martin v. Great Indian R. R. Co.*, L. R. 3 Ex. 9; *Gladwell v. Steggall*, 5 Bing. N. C. 733; *Pippin v. Sheppard*, 11 Price, 400; *Carroll v. Staten Island R. R. Co.*, 58 N. Y. 126; 17 Am. Rep. 221. In *Austin v. Great Western R. R. Co.*, L. R. 2 Q. B. 442, a suit was brought against a railroad company by a child three years and two months old. The plaintiff's mother, carrying the plaintiff in her arms, took a ticket for herself, but not for the child, for passage on the defendant's railway. In the course of the journey an accident happened, and the plaintiff's leg was broken. In a suit for this injury, the defendants contended that they were under no contract with the plaintiff, and that they carried the plaintiff without any hire or fare paid for carrying him. The action was held to be maintainable. Justice Blackburn said that "the right which a passenger by railway has to be carried safely does not depend on his having made a contract, but the fact of his being a passenger casts a duty on the company to carry him safely." The English cases to this effect are cited and commented on in *Foulkes v. Met. Dist. R. R. Co.*, L. R. 5 C. P. D. 157, 169. The rule may be considered as settled that a railroad company, having accepted a passenger, is under an obligation to take due and reasonable care for his safety, and that that obligation arises by implication of law independent of contract. To give

the plaintiff a standing in court to sue for the injury, she has no need of the aid of a contract which was illegal.

Nor was the plaintiff's violation of the Sunday law, in a legal sense, the cause of her injury. It was only the occasion for an injury by the defendant's wrongful act, and hence her wrong-doing did not contribute to the injury in such a sense as to deprive her of her right of action; it was merely a condition and not a contributory cause of the injury. Thus in *White v. Lang*, 128 Mass. 598, 35 Am. Rep. 402, it was held that if a person, while unlawfully traveling on Sunday, is injured by the assault of a dog, the act of traveling was not a contributory cause of the injury, and that he could, notwithstanding his own violation of the law, maintain his action against the owner of the dog. In sustaining the suit, the court said: "If a person, who is at the time acting in violation of law, receives an injury caused by the wrongful or negligent duty of another, he may recover therefor if his own illegal act was merely a condition and not a contributory cause of the injury. . . . It is true that if he were not traveling he would not have received the injury, but the act of traveling is a condition and not a contributory cause of the injury."

The ninety-second section of the road act (Rev. 1012) provides that all wagons and other wheel carriages of every kind or description traveling or passing on the highways within this state, belonging to residents therein, shall track on the ground not less than four feet and ten inches, under the penalty of five dollars for each offense, to be recovered, one moiety of which is to be paid to the overseer of highways and the other to the informer. The penalty in this statute, like that in the Sunday law, is prescribed for the purpose of prohibition, and not revenue, and a citizen traveling a public highway with a wagon of a narrower track than that named in the statute is engaged in violating the law. In some parts of this state the use of pleasure and business wagons of the New York gauge, which is narrower than that of our statute, is quite common. In collision cases on public highways, or at railroad crossings, the defense that plaintiff is debarred of his action on the ground of contributory negligence, for the reason that the wagon which he was driving did not conform to the statutory gauge, has never occurred to counsel, who are usually astute in discovering grounds of defense under the doctrine of contributory negligence. In my experience it has never been thought worth while to inquire in such cases as to the track

of the wagon injured or destroyed in such a collision, and a defense on that ground would obviously receive no consideration.

The cases sustaining the ruling of the trial judge on this head are numerous. They are cited and approved by leading text-writers in discussing this subject: Bishop on Non-contract Law, secs. 63, 64; 2 Wood on Railways, sec. 318; Beach on Contributory Negligence, sec. 81; Cooley on Torts, 2d ed., 178 (155) et seq., and notes. On principle, as well as by the weight of authority, the ruling of the trial judge was correct.

The station at which this accident happened was located upon an embankment elevated above the public road, which crosses the railroad under a bridge carrying the railroad over the public road. The company had a depot building for the reception of passengers on a level with the track on the north side of its track. At the west end of this building there were steps for the accommodation of passengers, leading down to the public road. On the south side of the embankment there was a stairway, leading also to the public road, built by private persons residing in that neighborhood, for their own convenience, and used by passengers as means of access to and from the station. The company did not construct or keep this stairway in repair. The stairway rested against the embankment of the railroad; it was on the company's grounds, and led to the public street. From the depot building to the top of the stairway there was a gravel walk, and the employees of the company testified that the passage was kept free and opened and unobstructed. It was, apparently, a way provided as a means of access to and from the company's depot grounds.

On the occasion when the plaintiff received her injury, the train reached the station at 9:35. The night was dark and stormy. There is no light in or about the depot building, and no person there to direct passengers as to the way to leave the depot grounds. The plaintiff, in crossing the tracks on her way to the stairway, fell over some timber and received the injury for which she sues. The plaintiff testified that the only time she was at that depot before that night she used this stairway, and that she knew of no other passage to or from the depot.

The judge submitted to the jury the question whether the plaintiff was justified in using this way out from the depot, in this language: "Did the plaintiff do right in taking this way out? That depends upon the question whether this way of

passage was there by the recognition, procurement, or assent of the company as a means for the entrance and exit of passengers. Proof of such approval by the company, or of its recognition, need not be made by any resolution or declaration of the company, or of its agents. If, to persons of ordinary understanding and discernment, it appeared to be such a way, and by the company it was allowed to remain and be in use by passengers going to or from trains, any one going to and from a train as a passenger was authorized to make use of it. If the company permitted it to be done openly, so that persons of reasonable judgment and discernment would conclude it to be a means of entrance and exit, then any passenger was authorized to take it and use it. It is submitted to you as a question of fact, whether, to an ordinary observer, this was held out as one of the passage-ways from the depot to the public street. If so, any passenger, unwarned, might use it as such. If you should so find, it is entirely immaterial who built the stairway or who kept it in repair."

The duty of a railroad company as a carrier of passengers does not end when the passenger is safely carried to the place of his destination. The company must also provide safe means for access to and from its station for the use of passengers, and passengers have a right to assume that the means of access provided are reasonably safe. If there be two ways, one of which is faulty in construction or repair, a passenger using it, and injured by its faulty condition, will not be debarred of his action, although the other, which he might have used, was safer: *Longmore v. Great Western R. R. Co.*, 19 Com. B., N. S., 188. A company having provided one safe and convenient way of ingress and egress to and from its station may, as contended for by the company's counsel, suffer private persons, for their own convenience, to have and use another way of access across its depot grounds, and it may be that those who use such a way will do so at their peril, if they have notice of the private character of the way. But that is not this case. The passage-way taken by the plaintiff led to the public street, and had every indication of having been provided for use by the public as a way to and from the station. Under the charge of the court and the finding of the jury, it must be taken to be the fact that this way of passage was there by recognition, procurement, or consent of the company, and that by sufferance and use it had obtained such an appearance of a passage-way passengers were invited to use, and that persons

of reasonable judgment and discernment would conclude it to be a means of entrance and egress. It was of a passage-way having these characteristics that the judge said that it was immaterial who built the stairway or who kept it in repair.

In *Beard v. Connecticut etc. R. R. Co.*, 48 Vt. 101, there was a stairway for passengers through the company's depot building, and also a stairway at each end of the passenger platform. The stairway at the north end was opened at the top, and there was nothing to indicate that it was not for the use of passengers. In fact, that stairway was built by an express company, and was used exclusively by the express company for removing express freight, and opened into the street, over a platform for loading and unloading express-wagons. The plaintiff, a passenger, in attempting to pass down the stairway in the dark, fell and was injured. For this injury she sued the railroad company. The defendant's counsel requested the trial judge to charge the jury that the plaintiff could not recover unless she showed that the lower platform, in stepping from which she was injured, was on the defendant's premises. The court declined to so instruct the jury, but told the jury that the plaintiff, to recover, must establish that the company was guilty of negligence in leaving the stairway, where it left the upper platform, open, and without any guard or notice to warn passengers that the stairway was not to be used as a way of passage to the street below, and that she was injured by such negligence or want of care on the part of the defendant, without any neglect or want of care on her part contributing to the injury. This instruction was held to be correct. The court, in sustaining the instructions of the trial judge, speaking of the likelihood of a stranger to regard that stairway as designed to furnish a safe way of getting to the street, said: "If not so designed, and it was unsafe to a stranger for such a purpose in the darkness, it was the duty of the defendant to forefend against injury by closing up the head of the stairs, or by notifying in some effectual way against using those stairs for getting to the street. . . . In view of the unquestionable law, the request to which the exception was taken seems frivolous. The open stairs on the margin of the platform led the plaintiff, without fault on her part, to the point of harm. . . . The fact that the bottom of the pitfall on which the plaintiff landed, and thereby received hurt, was beyond the line of ownership of the defendant neither relieved the duty nor mitigated the fault of the defendant."

In the case in hand, contributory negligence by the plaintiff was negatived by the jury. The case is here solely on the use of the passage-way by the plaintiff, and the duty of the company with regard to its condition and safety. We think the instruction of the trial judge on that subject was correct. A passage-way having the characteristics mentioned by the judge became, by the company's act, a passage-way which passengers were invited to use, with respect to which the company was under a duty to have it kept reasonably safe for use. A passenger using the way under such an invitation was not bound to inquire by whose contributions the stairway was erected or maintained. Nor was the company absolved from its duty in the premises by the fact that it erected and maintained, at its own expense, another way of exit.

The other exceptions on the record have been examined. We find no error in the conduct of the trial, and the judgment should be affirmed.

CARRIERS OF PASSENGERS, CARE REQUIRED OF. — Railways, as carriers of passengers, are bound to keep the platforms of their stations in a safe condition for persons to enter and leave the cars: *Pennsylvania Co. v. Marion*, 123 Ind. 415; 18 Am. St. Rep. 330, and note.

SUNDAY — NEGLIGENCE. — Disobedience of the Sunday law is not a good defense to an action by one who has been injured through the negligence of a railroad company upon whose cars he was riding as a passenger: *Louisville etc. R'y Co. v. Buck*, 116 Ind. 566; 9 Am. St. Rep. 883, and note.

EISNER v. HEILEMAN.

[52 NEW JERSEY LAW, 378.]

FRAUDULENT CONVEYANCE. — **FRAUDULENT JUDGMENT DEBTOR** cannot regain his own property which he has attempted to put beyond the reach of creditors, by purchasing it through another, under a subsequent judgment against himself; and the purchase-money so paid by him will be regarded as having been paid in satisfaction of his just obligations.

T. J. Middleton and John W. Wescott, for the plaintiffs in error.

P. V. Voorhees, for the defendant in error.

VAN SYCKEL, J. This action was instituted in the Camden circuit court by Heileman to recover possession of lands in the county of Camden.

The plaintiff derived his title to the lands through a deed

from the sheriff to him, dated February 9, 1885. The sheriff sold by virtue of an execution issued upon a judgment recovered March 27, 1882, by one Witham against Frederick Fisher.

The defendant's title rested upon a deed made by said Frederick Fisher to said Francis Frey shortly prior to the rendition of said judgment.

Heileman, in support of his action, showed, on the trial below, that the conveyance by Fisher to Frey was for the purpose of hindering and delaying Witham in the collection of his said debt, and therefore void.

In this aspect of the case, no doubt could be entertained of Heileman's right to recover.

But on the trial below Frey offered to show that Heileman purchased at the sheriff's sale for and on behalf of Fisher, the fraudulent debtor, and that although the sheriff's deed was made to Heileman, the consideration money was furnished by Fisher to Heileman, who held the title for Fisher.

This evidence was overruled by the trial judge, and thereupon judgment was recovered by Heileman.

I am of opinion that there was error in excluding this evidence.

In determining the competency of the proposed defense, we must regard Heileman and Fisher as one and the same person.

This, then, was the posture in which the offered evidence would have presented the case: Fisher, in the name of Heileman, was attempting to overthrow a prior title derived from himself, by setting up his own fraud. Frey's title was paramount according to date, and it could be postponed to the title acquired through the sheriff's deed only by showing Fisher's fraud. As against Fisher, the conveyance by him to Frey is good. Fisher would have no standing in a court of equity to put aside his own deed, nor could his fraudulent grantee appeal successfully to such a tribunal to lend him its aid in resisting any proceeding which Fisher might institute in a court of law. It is against the policy of the law to permit the fraudulent debtor to regain the property which he has attempted to put beyond the reach of the creditor. Therefore, neither in a court of law or equity is he permitted to set up his own fraud in avoidance of the deed which stands in his way. If the scheme resorted to in this case could prevail, the effect of this salutary rule for the suppression of fraud will be

greatly diminished, and the fraud-doer will experience little difficulty in dispossessing his fraudulent grantee.

In consequence of the attempted fraud, the law will regard this transaction as if no sale had been made under the judgment, and as if the fraudulent debtor had paid his money through Heileman in satisfaction of his just obligation. No valid title could pass to the debtor, nor to Heileman, who stood for him, by this device, conceived in fraud on his part. The legal title cannot prevail which has its inception in a contrivance which the law condemns; it comes from a tainted source.

Mulford v. Tunis, 35 N. J. L. 256, is relied upon to support the plaintiff's case.

The cases differ in this material respect. In *Mulford v. Tunis*, 35 N. J. L. 256, the fraudulent debtor's lands were sold under a *bona fide* judgment against him to one Pierson, who had no complicity with him. A valid legal title passed to Pierson, which was superior to the title of the debtor's fraudulent grantee. The supreme court held that the title thus acquired by Pierson, which was untainted by fraud, could not be lost by his attempt to transmit it to Tunis, his grantee, for a consideration paid by the judgment debtor. The title of *Mulford*, the fraudulent grantee of the debtor, was superseded and defeated by the operation of the sale and conveyance, under the judgment, to Pierson. In the case in hand, the fraud of the debtor rendered the sheriff's sale inoperative to pass the title for his benefit. The law leaves him in the position he made for himself by his fraudulent conveyance.

The judgment below should therefore be reversed.

FRAUDULENT CONVEYANCES. — The general rule is, that a fraudulent conveyance is valid as between the parties thereto, and neither can urge his own fraud as a means or ground of escape from his own act or deed: Note to *Carll v. Emery*, 12 Am. St. Rep. 517, 518.

CURRIE v. WAVERLY AND NEW YORK BAY RAILROAD COMPANY.

[72 NEW JERSEY LAW, 381.]

EMINENT DOMAIN — RULE OF COMPENSATION. — It is an established rule, in proceedings for the condemnation of lands, that the just compensation which the land-owner is entitled to receive for his land and the damages thereto must be limited to the tract a portion of which is actually taken.

EMINENT DOMAIN — MEASURE OF DAMAGES. — The mere platting of land into blocks on a map does not divide it into separate tracts so as to limit the owner's damages to the value of a particular block, a small parallelogram of which, as it appears on the map, is actually taken under the right of eminent domain.

EMINENT DOMAIN — PROOF OF SPECIAL VALUE OF LAND CONDEMNED. — The situation and surroundings of land sought for railroad purposes may impart to it a special commercial value for such purposes generally, and the owner may show such special value, and reap the benefit of it, when called upon to part with his land by the compulsory process of condemnation.

EMINENT DOMAIN — COMPENSATION. — **RULE APPLICABLE TO CONDEMNATION OF LAND TO QUASI PUBLIC USES** is, that the owner shall be given, by way of compensation for his land, its fair price for any use for which it has a commercial value of its own in the immediate present, or in reasonable anticipation in the near future. The owner is to be compensated for the deprivation of any existing value.

EMINENT DOMAIN — RULE OF COMPENSATION. — The rule that the special advantage of the land to the party acquiring it by condemnation by right of eminent domain shall not add to the compensation to be paid the land-owner applies to cases where the taking which is advantageous to the taker is not peculiarly disadvantageous to the seller. If, however, the advantageous feature is of such a nature that it is of special commercial value in the hands of either, then one cannot take it from the other without paying for such special value.

Randolph, Condict, and Black, for the plaintiff in error.

Vredenburg and Garretson, for the defendant in error.

GARRISON, J. This writ of error brings up the circuit record of an issue tried upon an appeal from the award of commissioners appointed to condemn the lands of Mungo J. Currie, upon the application of the Waverly and New York Bay Railroad Company. The land-owner is the plaintiff in error. The land taken for railroad purposes is a strip one hundred feet in width and seven hundred and seventy feet in length, lying near, but not fronting upon, New York Bay. The strip in question is part of a tract of several acres belonging to the same owner. This tract had been platted by its owner into town lots, and delineated upon a map showing

streets and avenues. In 1885 lots were offered at public sale by this map, but no lots abutting upon the avenues adjacent to the strip in question have been sold. The route selected by the railroad runs parallel with and in immediate adjacency to an avenue marked upon this map as Fifty-second Street. The block upon which the route is located is bounded, upon this map, by Fifty-second Street upon one side, and by Fifty-third Street upon the other, and is the only block any portion of which is actually taken by the railroad. In this situation of affairs, the jury were instructed by the trial court that the damages to be awarded to the land-owner must be limited to the particular block a portion of which, as shown upon the map, was actually taken, unless it appeared from the evidence that the owner was using that block, in common with the rest of his lands, for a single use. In explaining this instruction to the jury, the court used two illustrations. The jury was told that if the owner had a factory that covered three or four of these blocks, and was using that factory as an entirety, then the block taken would not be the limit for assessing damages. The other illustration was that of a farmer who, having mapped his farm into blocks, continued to cultivate it as a unit.

The propriety of the rule of damages thus laid down is the subject of a specific exception to the judge's charge.

It is an established rule of law, in proceedings for condemnation of land, that the just compensation which the land-owner is entitled to receive for his lands and damages thereto must be limited to the tract a portion of which is actually taken. The propriety of this rule is quite apparent. It is solely by virtue of his ownership of the tract invaded that the owner is entitled to incidental damages. His ownership of other lands is without legal significance. Within the tract thus owned his rights are twofold: 1. He is to be paid the value of the land included in the petition of the condemning agent; and 2. He is entitled to an award of such damages as result to the residue of his tract. In the application of this rule, no practical difficulty can arise where the tract is bounded by the lands of others. The difficulty, in so far as it has arisen hitherto, is in those cases in which the owner of several blocks of land separated from each other by public highways has claimed compensation for land taken in one block, and also incidental damages to his adjacent parcels. The question thus presented is said to have

been decided adversely to the claim of the land-owner in the case of *Matter of New York Central R. R. Co.*, 6 Hun, 149. That case decides that in the city of New York blocks of building lots are separate tracts, and that no tract can be regarded as incidentally injured save only the particular one out of which the land required by the railroad company is in fact taken. The value of this case as an authority upon the point under consideration is, however, greatly impaired, if not altogether destroyed, by the fact that by virtue of an act of the legislature of New York passed in 1813 the fee to the streets and other public lands in the city of New York is vested in the municipality: *Kellinger v. Forty-second St. etc R. R. Co.*, 50 N. Y. 206. For obvious reasons, this case furnishes no controlling principle applicable to those jurisdictions in which an owner may assert absolute continuity of title to abutting lands lying upon opposite sides of a public highway: *Salter v. Jonas*, 39 N. J. L. 469; 23 Am. Rep. 220; *Pennsylvania R. R. Co. v. Ayres*, 50 N. J. L. 660; *Ayres v. Pennsylvania R. R. Co.*, 52 N. J. L. 405. Indeed, a contrary view obtained recognition in the supreme court of this state in the case of *Somerville and Easton R. R. Co. v. Doughty*, 22 N. J. L. 495.

The present case, however, does not call for a decision upon this point. The question now before us is, not what would be the rule of damages where the owner's tract is actually subdivided by public highways, but whether the delineation of proposed subdivisions upon a map shall have the effect of limiting incidental damages to a particular block shown upon such map. The question thus presented is quite apart from the rights which a vendee purchasing by such map acquires against his vendor. As the case comes before us, there is nothing actually upon the ground, nor is there anything constructively in the conduct of the owner, to break the previous unity of his title over his entire tract. The fee in the lands marked "streets" upon the map, which would have remained in him even if an easement had actually attached, is as yet in him, unsubjected to any burden which an invading corporation can set up as the legal limit of the territory over which the rule of resulting damages may extend. If damages are to be confined to a small parallelogram of land out of a tract of many acres similarly, although not equally, injured, it must be either because the land thus selected is in fact a separate tract, or because, by virtue of some rule of law, it must be so regarded. In the present case, neither of

these conditions exists. The instruction, therefore, that the owner's damages must be limited to a particular block delineated upon his map, unless he could, by evidence, show an actual and *contra* user, was giving to the mere act of platting of the land upon paper an effect in excess of its legal import. The presumption of law thus assumed threw upon the owner of the lands a burden of proof which must be regarded as injurious to his property rights. For the correction of this error there must be a new trial.

A further question is presented upon this record. Upon the trial of the appeal, a line of proof was offered by the land-owner, which was overruled, and a bill of exceptions allowed. The offer was to prove, in respect to the lands taken, a number of matters tending to show that it possessed a special value for railroad purposes generally, irrespective of its individual advantages to the defendant in error. Some of the matters thus offered were purely speculative opinions, while others were conclusions from undisclosed facts. Such offers were properly overruled. There were, however, offers which we think were improperly rejected. Among other things, the land-owner offered proof upon the following points: 1. That more than two thirds of the land in Hudson County lying upon the New York Bay was occupied as railroad termini; 2. The situation of the land in question in relation to this water-front; 3. The width of the territory thus available; 4. The relation of the land in question to that portion of New York Bay as yet unappropriated for railroad purposes. These offers were overruled, not because they were unsusceptible of proof, but because they were regarded as not proper subjects for the consideration of the jury in estimating the amount of their award. The propriety of this ruling is before us upon this record. In substance, the land-owner offered to show to the jury the situation and surroundings of the land in question, with reference to its special availability as a railroad approach to an established center of commerce. His contention was, that if this availability could be shown, it gave to his lands a pecuniary value for this purpose for which, as their owner, he was entitled to be paid. In the aspect in which the case comes before us, we must assume that such an availability existed, and that it could have been shown. The rule is imperative that where an offer is made and rejected, those things must be considered as true which the plaintiff in error offered to prove and was not permitted

to prove: *Peak v. State*, 50 N. J. L. 179, 219; *Peacock v. State*, 50 N. J. L. 653, 655; *Scotland County v. Hill*, 112 U. S. 183, 186. The questions raised by this ruling are: 1. May the situation and surroundings of land sought for railroad purposes impart to it a special value for such purposes generally? 2. If such special value is shown, may the owner reap the benefit of it when called upon to part with his land by the compulsory process of condemnation? That land near a center of trade increases in value with the growth of commerce, and in the line of its requirements, is not more self-evident than that as the locations for railroad access to such a center are taken up and occupied, the residue of the lands available for such purposes increases in special value in proportion to the demand thus created and to the scarcity thus produced. From the same elements of common knowledge, it results that the value arising from this situation of affairs is an existing value, inherent in the residue of such lands at whatever time any portion of such residue is sought by a new claimant for railroad facilities.

It would be contrary to economic law and repellent to common justice to permit the fact that the lands are selected by a public agent because of this availability to strip them of any element of value which, independently of the new-comer and prior to his advent, they possessed. The fact that the special value acquired by lands thus situated has arisen from their availability for purposes similar to those to which the condemning party proposes to put them is without significance. Such an availability is not special to this one carrier; it is general to all who are engaged, and to all who may be engaged, in similar enterprises, whose existence and whose presence as a class at or near these lands became an admitted fact by the rejection of testimony competent to prove it. Whether this circumstance does or does not impart an appreciable money value to any given piece of land is a pure question of fact, and must be treated as such. Our present concern is to discover by what rule of law applicable to investigations of this character the jury are excluded from passing upon this element of value, if in fact it exists. The rule of law applicable to the condemnation of land to these quasi public uses is, that its owner shall be given, by way of compensation for his land, its fair price for any use for which it has a commercial value of its own in the immediate present or in reasonable anticipation in the near future. It is for the

owner's deprivation of any existing value that he is to be compensated. Neither the individual advantages to the party acquiring the land, nor the necessity of its acquisition, can be considered in computing the loss of the land to the owner; but there is nothing in this principle which I have stated as favorable to the public agent, as the law admits, which will enable a condemning party to take, without payment, land values not created by it nor based upon its advantage or necessity, but which, on the contrary, antedated its advent, and owe their existence to natural situation and growth of trade, and the general economic laws underlying all commercial values. The rule that the special advantage of the land to the acquiring corporation shall not add to the compensation to be paid the land-owner applies to cases where the taking, which is advantageous to the purchaser, is not pecuniarily disadvantageous to the seller. If, however, the advantageous feature is of such a nature that it is of commercial value in the hands of either, then one cannot take it from the other without paying for it.

These views are in entire harmony with the principle laid down by the supreme federal court in *Mississippi etc. Boom Co. v. Patterson*, 98 U. S. 403, where it was held that the situation of certain islands, with reference to their special adaptability to booming purposes, might be shown as a circumstance which the owner had a right to insist upon as an element in estimating the value of his lands. Similar views have been expressed in many of the state courts: *Trustees of College Point v. Dennett*, 5 Thomp. & C. 217; 2 Hun, 669; *Chicago etc. R. R. Co. v. Jacobs*, 110 Ill. 415; *Gardner v. Brookline*, 127 Mass. 358, 363; *Haslam v. Galena etc. R. R. Co.*, 64 Ill. 353; *Young v. Harrison*, 17 Ga. 30; *Calumet River R'y Co. v. Moore*, 124 Ill. 329.

In *In re New York, Lackawanna etc. R. R. Co.*, 27 Hun, 116, the court goes to a much greater length in applying this principle than is necessary for its support in cases like that before us. In that case the owner of an abandoned canal-bed successfully maintained an award based upon its special adaptability to railroad purposes. I do not feel called upon to express any opinion as to the propriety of the application made of the law to the facts of that case. The correct principle was, however, recognized by the court, and for that alone the case is now cited with approval.

To the same end may be cited *Goodin v. Cincinnati etc. Co.*, 18 Ohio St. 181; 98 Am. Dec. 95; *Cohen v. St. Louis etc. R. R.*

Co., 84 Kan. 158, 164; 55 Am. Rep. 242; *Johnson v. Freeport etc. R'y Co.*, 111 Ill. 413, 419; *Lake Shore and Western R'y Co. v. Chicago etc. R. R. Co.*, 100 Ill. 21, 33.

Under the law as thus expounded, the land-owner in the present case should have been permitted to produce evidence as to the situation and surroundings of his land, as they existed at the time of the location of the company's route, for the purpose of demonstrating, if he was able, that there resulted to his land, from these circumstances, a special value growing naturally out of the best use to which, from its situation, it was presently adapted. Guarded by the exclusion of speculative opinions upon the one hand, and of the individual advantages to the condemning agent upon the other, such a course will best secure to the owner of the lands taken that compensation for their general value which is guaranteed by the constitution whenever private property is taken for a public use.

A further ground of exception was the admission of testimony as to the price at which a witness, who was a stranger to this record, had offered to sell to another stranger a piece of land belonging to yet a third stranger, but adjoining the tract in question. The proof was clearly incompetent: *Montclair R. R. Co. v. Benson*, 36 N. J. L. 557. The attention of the court was not, however, directed to any special ground of objection, and it is evident that the objection was deemed to be addressed to the period of time at which the transaction in question occurred. Had the reason which is now urged been presented at the time, the question would, in all probability, have been overruled. A general objection to the admission of testimony is unavailing upon error: *Oliver v. Phelps*, 20 N. J. L. 181.

The record will be remitted, and a *venire de novo* awarded.

EMINENT DOMAIN — CONDEMNATION OF RIGHT OF WAY FOR RAILROAD.
 — *Who must be Compensated.* — A railroad taking private property under the right of eminent domain must compensate the owner therefor: *Newman v. Metropolitan E. R'y Co.*, 118 N. Y. 618; and the execution of a bond of indemnity is not sufficient as such compensation: *Asher v. Louisville etc. R. R. Co.*, 87 Ky. 391; *Covington etc. R'y Co. v. Piel*, 87 Ky. 267. The compensation paid the owner takes the place of the land taken, with respect to all the rights and interests dependent upon and incident to it: *Utter v. Richmond*, 112 N. Y. 610. The owner of the land at the date of its taking, or his assignee, is the proper person to be compensated: *Smith v. Railway Co.*, 88 Tenn. 611; *Whitaker v. Leavenworth etc. R. R. Co.*, 41 Kan. 315. However, a tenant for years has such an interest as will entitle him to recover compensation: *Pier v. Burlington etc. R. R. Co.*, 126 Ill. 436; the rule being that

the damages should be apportioned between the owner and his tenant for years: *Commissioners v. Johnson*, 66 Miss. 248. A settler may have his homestead interest condemned, but must be fully compensated therefor: *Burlington etc. R. R. Co. v. Johnson*, 38 Kan. 142. The title being in the United States, the occupant of land under a timber-culture claim can recover only damages for the diminished value of his interest, not for the diminished value of the land itself: *Chicago etc. R. R. Co. v. Hurst*, 41 Kan. 740. Where two persons own the land, but after the filing of the petition, and before the appraisement, one buys out the other's interest, he is entitled to the whole compensation: *Northeastern etc. R. R. Co. v. Frazier*, 25 Neb. 42.

Measure of Compensation—General Rules.—Compensation for the property injured or taken must be estimated with reference to the existing condition of the property at the time; and the owner need not remove buildings or fixtures in order to lessen his damages: *Chicago etc. R'y Co. v. Ward*, 128 Ill. 350. The rule of compensation, generally, is the difference between the value of the land before the construction of the railroad and its value thereafter, uninfluenced by the increase or decrease in property values of surrounding tracts of land: *Omaha etc. R'y Co. v. McDermott*, 25 Neb. 714. See also extended note to *Ohio etc. R'y Co. v. Wachter*, 5 Am. St. Rep. 537-540; extended note to *Winona etc. R. R. Co. v. Waldron*, 88 Am. Dec. 113-121. One method of ascertaining the just compensation in such cases is to make an estimation as if the owner were willing to sell and the company to buy the particular land at that place and in that form, together with any incidental damages that might naturally result to other lands of the owner by the taking, with interest from the date of appropriation: *Alloway v. Nashville*, 88 Tenn. 510. Evidence of offers for the purchase of an adjoining lot to the one taken is admissible to prove its market value: *Muller v. Southern Pac. B. R'y Co.*, 83 Cal. 241. In estimating the damages to the owner, occasioned by the appropriation of a tract or a portion of a tract of land, the following things may be taken into consideration: The value of the land in connection with its appurtenances, such as its use in connection with an adjoining lot upon which is a coal-office and weighing-scales: *Chicago etc. R'y Co. v. Ward*, 128 Ill. 350; the diminution of the value of the land as a place of business: *Grand Rapids etc. R. R. Co. v. Weiden*, 70 Mich. 391; *Muller v. Southern Pac. B. R'y Co.*, 83 Cal. 241; proximate inconveniences resulting as to the use of the property, when they affect the market value of the same: *Sullivan v. North Hudson R. R. Co.*, 51 N. J. L. 519; *Dudley v. Minnesota etc. R'y Co.*, 77 Iowa, 408; such as inconveniences by reason of cuts, excavations, noise, bell-ringing, whistling, blowing, smoke, and cinders: *Fort Worth etc. R'y Co. v. Pearce*, 75 Tex. 281; and danger to the property from fire: *Leroy etc. R. R. Co. v. Ross*, 40 Kan. 598. In estimating the market value of land appropriated, its price at a forced sale is not the measure of damages, but the price it would bring after a reasonable time at a private sale; and its value for a particular purpose for which it has not been used may be considered: *San Diego Land Co. etc. v. Neale*, 78 Cal. 63; *Doud v. Mason City etc. R'y Co.*, 76 Iowa, 438. But in *Alloway v. Nashville*, 88 Tenn. 510, it was decided that estimates of value based upon the particular adaptabilities of the land for certain purposes, as its value for a stone quarry or a reservoir site, to the exclusion of other elements of value, were inadmissible.

Rule where only a Part of the Tract is Taken.—The railroad having appropriated parts of certain lots in a block, the whole of which was owned by one person, he was not limited in his recovery of compensation to the damages merely to the lots touched by the right of way, but was entitled

to recover for the damages occasioned to the whole block: *Cox v. Mason City etc. R'y Co.*, 77 Iowa, 21; *Chicago etc. R'y Co. v. Ward*, 128 Ill. 351. So where a number of tracts of land are used together and farmed as one farm, the injury to the entire farm must be considered in estimating the owner's damage by reason of the location of a right of way across a portion thereof: *Northeastern etc. R. R. Co. v. Frazier*, 25 Neb. 42; *Dudley v. Minnesota etc. R'y Co.*, 77 Iowa, 408; *Doud v. Mason City etc. R'y Co.*, 76 Iowa, 438; *Alloway v. Nashville*, 88 Tenn. 510; note to *Winona etc. R. R. Co. v. Waldron*, 88 Am. Dec. 114, 119.

Effect of Benefits Accruing to the Land-owner: See note to *Symonds v. Cincinnati*, 45 Am. Dec. 532-536; note to *Patten v. Northern etc. R'y Co.*, 75 Am. Dec. 616. In estimating the compensation due for taking away easements, or interfering therewith, the benefits accruing to abutting property owners by the construction and operation of a railroad along a street must be considered as well as the damage that results therefrom: *Newman v. Metropolitan E. R'y Co.*, 118 N. Y. 619. If there has resulted no depreciation in the value of a lot, the owner can be allowed no compensation: *Muller v. Southern Pac. B. R'y Co.*, 83 Cal. 241. The enhancement in value of adjacent lands belonging to the same owner cannot be considered: *Newman v. Metropolitan E. R'y Co.*, 118 N. Y. 618; *San Diego Land Co. v. Neale*, 78 Cal. 63.

✓ *Speculative Damages.*—Merely speculative damages should not be considered in estimating the compensation to which an owner is entitled: Note to *Winona etc. R. R. Co. v. Waldron*, 88 Am. Dec. 120, 121; and to the same effect is *Muller v. Southern Pac. B. R'y Co.*, 83 Cal. 241.

Opinion Evidence as to the Value of Land Taken: See note to *Winona etc. R. R. Co. v. Waldron*, 88 Am. Dec. 118, 119; *Omaha v. Kramer*, 25 Neb. 489; 13 Am. St. Rep. 504, and note. Persons familiar with the value of a particular piece of land across which a railroad has been built may testify as to the value of the same immediately before its appropriation and its value immediately thereafter: *Blakeley v. Chicago etc. R. R. Co.*, 25 Neb. 207. Farmers residing near and who know the capacity of the land may give their opinions as to its value, even though they do not know of any sale of a farm in the neighborhood: *Kansas City etc. R. R. Co. v. Baird*, 41 Kan. 69; *Kansas City etc. R. R. Co. v. Ehret*, 41 Kan. 22; but a farmer not engaged in buying and selling farm lands, not conversant with the market values of farm lands in that vicinity, and not knowing the capacity and fertility of the farm, cannot give his opinion as to the value thereof after its partial appropriation as a right of way by a railway company: *Leroy etc. R. R. Co. v. Ross*, 40 Kan. 598; *Ottawa etc. E'y Co. v. Fisher*, 42 Kan. 675. The opinion of the witness should be as to the value of the land, not as to the damage thereto: *Ottawa etc. R'y Co. v. Adolph*, 41 Kan. 601; and the proper question is to ask him what is the difference in the values of the land before and after the railroad was built across it: *Sigafoos v. Minneapolis etc. R'y Co.*, 39 Minn. 8. The burden of proof is upon defendant to establish the value of land taken by eminent domain: *Monterey Co. v. Cushing*, 83 Cal. 507; but it devolves upon the company to show the necessity for taking it: *Grand Rapids etc. R. R. Co. v. Weiden*, 70 Mich. 391.

CASES
IN THE
COURT OF APPEALS
OF
NEW YORK.

ABENDROTH v. MANHATTAN RAILWAY COMPANY.

[122 NEW YORK, 1.]

OWNER OF A LOT FRONTING ON A STREET, though he has no title in any part of the lands upon which such street is located, may sustain an action to recover damages resulting to him from an obstruction of the street impairing in a substantial degree the light or accessibility of his premises, or otherwise occasioning damage or annoyance to the occupants thereof.

STREETS—CONSTITUTIONAL LAW.—An abutting owner, the fee of the streets being in the city, is entitled to the use of the street, and neither the legislature nor the city can devote it to purposes inconsistent with street uses, without compensation. An abutting owner on streets possesses, as an incident to such ownership, easements of light, air, and access in and from the adjacent streets, for the benefit of his abutting lands, and the appurtenant easements and outlying rights constitute private property, of which he cannot be deprived without compensation.

CONSTITUTIONAL LAW—TAKING OF PROPERTY, WHAT IS.—The rights of an abutting lot-owner in an adjacent street, though he has no title in the lands under such street, are private property, and the construction and operation of an elevated railway in such streets, in front of his property, is a taking of his rights for public use.

STREETS.—OPERATION OF AN ELEVATED RAILWAY IN A PUBLIC STREET IN FRONT OF PLAINTIFF'S PREMISES, whereby a large portion of the street is filled, and the light is seriously impaired, and smoke, steam, and cinders at times are caused to enter such premises, entitles him to recover damages for the injuries thereby inflicted, though he does not have any title to any part of the street, and the construction and operation of the railway were authorized by an act of the legislature.

LACHES IN BRINGING ACTION TO RECOVER DAMAGES sustained by the plaintiff from the erection and operation of an elevated railway on a street in front of his premises does not constitute any defense.

ACTION to recover damages alleged to have been suffered by the plaintiff from the construction and operation of an elevated

railway in front of his premises, on Pearl Street, in the city of New York, and to restrain the further operation of such road. Plaintiff acquired title to his property in 1865. In 1871 the New York Elevated Railway Company was incorporated, and in the years 1877 and 1878 built and commenced operating the railway of which complaint is made. In May, 1879, it leased the right to the New York Elevated Railway Company, by which it was subsequently operated. The following facts were found by the trial court: "Pearl Street, in front of plaintiff's said premises, is forty-one feet wide between the house lines; and the sidewalk is from nine feet eight inches to nine feet eleven inches wide. The elevated railroad structure, erected as aforesaid in front of these premises, consisted of a double row of hollow latticed iron columns, set about opposite each other in the edges of the sidewalk, on each side of the street, at intervals along the street of about forty feet, each column being fifteen inches square, standing on an iron plate about eighteen inches square, supported by a foundation of stone, brick, etc., beneath the surface of the ground, about eight feet deep and six feet square, and said pairs of columns being connected, at a height of about sixteen feet above the street, with open-work iron cross-girders about twenty-two feet six inches long, three feet deep, and one foot wide on top, upon which, along the street, were placed four open-work iron longitudinal girders about three and one half feet deep, and one foot wide on top, on which were laid, at a height of about twenty-two feet above the street, two railway tracks, consisting of iron rails placed upon wooden ties or sleepers, said rails being laid in parallel lines about four feet eight and one half inches apart, and said sleepers being about eight feet long, and eight inches wide, and six inches thick, and placed with open intervals, from sleeper to sleeper, of sixteen inches; the said tracks were laid seven feet three and one half inches from each other, and just outside each iron rail was placed a wooden guard-rail parallel with the rails; said guard-rails being about eight inches high and six inches wide. Between the tracks is a narrow plank walk-way. The said upper structure was made of open iron-work, with cross-braces. The building on plaintiff's said premises were erected upwards of fifty years ago. It is a brick building, four stories high, twenty feet wide, about sixty feet deep, and measuring forty-three feet two inches in height from the sidewalk to the cornice line. The nearest rail of the elevated railroad is ten feet and six inches from the face

of said building; the nearest portion of the upper structure of said railroad is about seven feet six inches from the face of said building. The level of the tracks is a little above the second-story windows. One of said iron columns stands in the edge of the sidewalk, opposite the westerly wall of plaintiff's said building, so that the westerly line of plaintiff's said premises prolonged into the street would intersect the same, and leave about ten inches of the width of said column east of said line; and the space between the south face of said column and the face of plaintiff's said building at the nearest point is eight feet. The said railroad structure does not interfere with the air of plaintiff's building, or with access thereto, in any substantial degree; that said structure is permanent, has and does fill a large portion of the space of said street in front plaintiff's said premises and seriously impairs his light; that said engines (those drawing the trains) emit smoke, gas, steam, and cinders, which, at times, have and do enter the plaintiff's premises, through his doors and windows, and cause him injury; that by reason of the facts aforesaid, the rental value of the plaintiff's premises has been seriously diminished, . . . and his property has been and is permanently damaged, and its value lessened; that plaintiff's north line is the south-side line of Pearl Street." Upon these findings the trial court dismissed the complaint, and the general term of the superior court of the city of New York, on appeal, reversed the judgment of the trial court, and from this judgment of reversal an appeal was taken to the court of appeals.

Edward C. James and Julien T. Davies, for the appellants.

Charles P. Cowles and Justus A. B. Cowles, for the respondent.

FOLLETT, C. J. The principal questions involved in this appeal are: 1. Has the plaintiff, by his ownership of a lot abutting on Pearl Street, private rights or rights of property therein? 2. Have the defendants taken or materially impaired those rights, if any the plaintiff has, within the meaning of the constitution? The term "abutting owner" will be used in this judgment to denote a person having land bounded on the side of a public street and having no title or estate in its bed or soil, and no interests or private rights in the street except such as are incident to lots so situated. The evidence upon which the facts were found not appearing in the record, the findings of the trial court must be accepted as true. In addi-

tion to the finding that the plaintiff's lot does not extend beyond the line of the street, it should be noted that there is no finding that the plaintiff or any one of his predecessors ever had any title to or estate in the land whereon this street is maintained, or any interest in the street except that of an abutting owner. The view taken of the rights of abutting owners renders it unnecessary to consider the much-debated and interesting historical question as to whether the island of Manhattan was, within the law of nations, so discovered, settled, subjugated, or possessed by the United Provinces as to impress upon it and its inhabitants the law of that country, and the general rule of the civil law that the title to the soil of highways and the beds of public streets is in the government. If the plaintiff, by virtue of being an abutting owner, has not sufficient private rights or interests in this street to have enabled him to have maintained an action for the injuries found to have been inflicted, or for similar injuries inflicted without legislative authority, then he is without remedy in this case. In the cases about to be referred to, the plaintiffs were not all abutting owners, but none of them owned the part of the street whereon the obstruction or encroachment was placed which was the cause of the injury complained of. In *Corning v. Lowerre*, 6 Johns. Ch. 439, the owner of a lot on Vestry Street was held entitled to maintain an action to restrain the defendant from obstructing the street. In *Van Brunt v. Ahearn*, 13 Hun, 388, the parties owned lots on Catharine Street, in Brooklyn. The defendant obstructed the street at a point some distance from the plaintiff's lot, causing him special damages, and it was held that the plaintiff had such a private right, the right of free ingress and egress, that he could maintain an action to recover his damages and restrain the continuance of the obstruction.

In *Crooke v. Anderson*, 23 Hun, 266, the parties owned lots on Washington Avenue, in the city of Brooklyn, and the defendant encroached (not obstructed) on that part of the street which was in front of his lot, so that the street was less convenient for the plaintiff's use in going to and from his lot, thus specially damaging the plaintiff, and it was held that he could maintain an action to abate the encroachment.

In *Fanning v. Osborne*, 34 Hun, 121, 102 N. Y. 441, the plaintiff was an abutting owner on Garden Street, in the city of Auburn, and the defendant, without legislative authority, maintained a railroad track in the street, over which cars were

drawn by the power of steam. It was held that the plaintiff (he showing that he had sustained special damages) had a sufficient private right in the street to maintain an action to restrain the operation of the railroad. The same doctrine was held in *Husser v. Brooklyn C. R. R. Co.*, 114 N. Y. 433; 11 Am. St. Rep. 679.

In *Callanan v. Gilman*, 107 N. Y. 360, 1 Am. St. Rep. 831, two abutting owners on Vesey Street, in the city of New York, were engaged in business in adjoining stores. It was held that the plaintiff could, by action, restrain the defendant from improperly obstructing the sidewalk by using a temporary bridge or plank-way by which goods were taken from and into the store, and thus causing a special injury or damage to the plaintiff.

In *Stetson v. Faxon*, 19 Pick, 147, 31 Am. Dec. 123, the parties owned adjoining lots in the city of Boston, which were bounded north by Ann Street, and south by a street running along the north side of Market Square. The city laid out a new street south of the last-mentioned one, and sold to the defendant the land between his lot and the new street, which had formed a part of the old street. The defendant erected fences and buildings on the land so purchased, which impaired the value of the plaintiff's property by rendering it less convenient of access and obscuring the view. In an action to recover damages it was held that, the old street not having been legally discontinued, the defendant was liable. The principle running through these cases has been maintained in England for at least two hundred years: *Maynell v. Saltmarsh*, 1 Keb. 847; *Fritz v. Hobson*, L. R. 14 Ch. Div. 542. The same rule has been held applicable to country highways: *Pierce v. Dart*, 7 Cow. 609; *Hood v. Smith*, 5 Week. Dig. 117; and has received the sanction of the courts of most of the states in the Union: Angell on Highways, sec. 285. These cases do not rest on the fact that the wrongs happened to amount to public nuisances, for no person can maintain a private action for the recovery of damages against the creator or maintainer of a public nuisance unless it occasions him special damages by an immediate injury to his person or property, or by a consequential injury to his property: *Lansing v. Smith*, 8 Cow. 146; 4 Wend. 10; 21 Am. Dec. 89; Wood on Nuisances, 655. All of these cases were for the recovery of consequential damages to real property bounded by the side or center of the street, or for the recovery of such damages sustained by occupants of

such property, and in none of the cases were the obstructions or encroachments on or opposite to the property of the plaintiff. There are important differences between the case at bar and those cited. In the cases referred to, the acts which were held to be actionable wholly or partly obstructed the streets and rendered the property of the plaintiffs less accessible, and none of them were done pursuant to legislative authority; while in the case at bar, the acts complained of were done pursuant to such authority, and do not, as found by the court, impair in any substantial degree the accessibility of the plaintiffs premises. But these cases do establish the principle that the owner of a lot on a public street, whether it extends across to the center or only to the side of the street, has incorporeal private rights therein which are incident to his property, which may be so impaired as to entitle him to damages. If this be not so, it is difficult to see how he can maintain any action except such as can be maintained by a stranger for an immediate injury to person or property caused by an obstruction while lawfully traveling in the street. The judgments in *Story v. New York E. R. R. Co.*, 90 N. Y. 122, 43 Am. Rep. 146, *Lahr v. Metropolitan E. R'y Co.*, 104 N. Y. 268, seem to compel this conclusion. In *Story's* case importance was given to the language of a covenant contained in the grants dividing and conveying the lots forming a larger tract owned and granted by the city (of which *Story's* lot was a part), and to chapter 86 of the Revised Laws of 1813, under which the street was laid out. But the judgment in *Lahr's* case was not placed on the ground that any rights in or to the bed of the street had been granted or reserved for him, or to any of his predecessors; and it was held, some force being given to the act of 1813, that he had rights of property in the street.

The learned judges who delivered the dissenting opinions in *Story's* case did not deny, but rather assumed, that the abutting owner had rights of property in the street, and held that those of the public were paramount, that the rights of both arose and existed by virtue of the same authority, and that those of the abutting owner could, by legislative and municipal action, be further subordinated to the rights of the public for the purpose of affording additional and necessary facilities for the transportation of persons and property through the street. Since *Story's* case was decided, questions akin to the one under consideration have been discussed by the court

of appeals. In *Mahady v. Brunswick R. R. Co.*, 91 N. Y. 153, 43 Am. Dec. 661, Andrews, J., in delivering the opinion of the court, said: "The plaintiff, though an abutting owner simply, the fee of the street being in the city, was entitled to the use of the street, and neither the legislature nor the city could devote it to purposes inconsistent with street uses, without compensation, according to the principle of *Story v. New York E. R. R. Co.*, 90 N. Y. 122; 43 Am. Rep. 146." Again, the same learned judge, in delivering the opinion in *Pond v. Metropolitan E. R'y Co.*, 112 N. Y. 188, 8 Am. St. Rep. 734, said: "The *Story* case (90 N. Y. 122), established the principle that an abutting owner on streets in the city of New York possesses, as incident to such ownership, easements of light, air, and access in and from the adjacent streets, for the benefit of his abutting lands, and that the appurtenant easements and outlying rights constitute private property, of which he cannot be deprived without compensation."

In *Powers v. Manhattan R'y Co.*, 120 N. Y. 178, Brown, J., in his opinion, said: "The facts of the *Story* case were not broad enough to necessarily cover the case of an abutting owner whose only property in the street was an easement for light, air, and access, and hence the right of such owners to maintain actions for damages was not finally set at rest until the decision in *Lahr v. Metropolitan E. R'y Co.*, 104 N. Y. 268." The cases last cited did not, perhaps, involve the question discussed in the remarks quoted; but it cannot be assumed that they were made without deliberation; for since *Story's* case this precise question has been much debated and hardly out of the minds of the judges of the court of last resort.

The judgments for damages which have been recovered and sustained against the elevated roads do not and cannot rest on the ground that the roads are public nuisances, for they were constructed pursuant to statutes; and besides, as before stated, a public nuisance does not create a private cause of action, unless a private right exists and is specially injured by it. The only remaining ground upon which they can and do stand is, that by the common law the plaintiffs had private rights in the streets before the roads were built or authorized to be built. It is clear, we think, that these rights were not created by the statutes under which the corporations were organized, nor by the construction of the roads; nor do they exist by force of the judgment in *Story's* case; but they existed anterior to the construction of the roads, and have simply been defined and

protected by the decisions made in the litigations against these corporations.

It being established that an abutting owner has property rights in the streets, and that an action could have been maintained against the defendants for the recovery of the damages caused by their acts, had they been done without legislative authority, it becomes material to inquire whether such right of action is cut off because the road was constructed pursuant to such authority.

The constitution of this state provides: "Nor shall private property be taken for public use without just compensation": Art. 1, sec. 6.

It is settled by Story's case and Lahr's case that such rights as the plaintiff has in Pearl Street "are private property," within the meaning of the constitutional provision quoted; and these cases also hold that by the construction and operation of an elevated road in the street in front of an owner's premises his rights are "taken for public use," within the meaning of the constitution. It follows that the authority conferred by the legislature to construct the road is not a defense to the action.

Fobes v. Rome etc. R. R. Co., 121 N. Y. 505, does not decide that an abutting owner has not vested rights to light, air, and access in a public street which are incident to his lot and which are private property, within the meaning of the constitution; but that the operation, pursuant to legislative authority, by the defendant, of its steam-railroad on the grade of the street, which was at about the natural surface of the ground, was not an actionable invasion of the abutter's right. The learned judge who wrote the opinion in that case thus defined the limits of the question to be discussed: "It [defendant] admits that plaintiff had an easement in that street, but it denies that it has occupied or appropriated it. Whether it has taken any portion of the plaintiff's easement in the street in question is what the defendant asks shall be decided by us, and it denies *in toto* any taking whatever of the plaintiff's property, or any portion thereof."

The conclusion which we arrive at is, that the erection and operation of the elevated road in Pearl Street immediately in front of the plaintiff's premises in the manner and with the effect described in the findings of fact was a material impairment of the plaintiff's right of property for which he is entitled to recover compensation for the damages inflicted.

It is urged that if the plaintiff ever had a right of action, it has been lost by his acquiescence in the construction and use of the road by the defendant. It is found that when the road was being built through this street the plaintiff forbade the New York Elevated Railroad Company to construct it, and threatened that corporation with litigation, but began no action until this suit was commenced, and in the mean time he has occasionally been a fare-paying passenger on the road. Had this action been brought in equity solely for the purpose of compelling the defendants to remove their structure, and if all persons having such interests in the elevated road as would entitle them to be heard before such relief could be granted were parties to the action personally or representatively, this question might require some consideration; but in an action for the recovery of damages, the conduct of the plaintiff as found by the court, and his delay in bringing the action, is not a defense.

The order should be affirmed, and judgment absolute rendered against the appellants, with costs.

STREETS — RIGHTS OF ABUTTING OWNERS. — The erection and operation of a railway in a street is inconsistent with the use of the street, and with regard to abutting owners, is a taking of private property, which will not be permitted without the proper compensation to such owners: *Husner v. Brooklyn C. R. R. Co.*, 114 N. Y. 433; 11 Am. St. Rep. 679, and particularly note. And this rule is applicable to elevated railways constructed in streets: *Pond v. Metropolitan E. R'y Co.*, 112 N. Y. 186; 8 Am. St. Rep. 724. As to the right of a railroad to obstruct a street, and its liability for unnecessarily doing so, see note to *Oullanax v. Gilman*, 1 Am. St. Rep. 843. See also *Street R'y Co. v. Doyle*, 88 Tenn. 747, 17 Am. St. Rep. 933, and note, to the point that steam-railways are additional servitudes upon a street, for which abutting owners are entitled to compensation. It makes no difference that the fee to the street is not in the abutting owner; for his right to use the street as a street is as much property as the street itself: *Theobald v. Louisville etc. R'y Co.*, 66 Miss. 279; 14 Am. St. Rep. 564, and note. Compare note to *Sheehy v. Kansas City Cable R'y Co.*, 4 Am. St. Rep. 402, 403.

LOBILLARD v. CLYDE.

[122 NEW YORK, 41.]

SEVERAL ACTIONS TO RECOVER INSTALLMENTS DUE ON A CONTRACT. — Each default in the payment of money falling due by a contract, payable in installments, may be the subject of an independent action, provided it is brought before the next installment becomes due; but each action should include every installment due when it is commenced, unless a suit is at the time pending for the recovery thereof, or other special circumstances exist.

RE JUDICATA. — WHERE A CONTRACT IS PAYABLE IN INSTALLMENTS, and the court, in an action to recover one of such installments, determines that the contract is divisible, that a separate action may be prosecuted for each installment, though other installments were due when such action was commenced, such determination is conclusive upon the parties with respect to the character and construction of the contract, and estops them from subsequently insisting that successive actions may not be brought and independent judgments recovered, even for installments that were due and not in the suit when the action to recover one thereof, without including the others, was commenced.

RE JUDICATA. — A judgment rendered on the merits is co-extensive with the issues upon which it is founded, and is conclusive between the parties thereto, not only as to the matters actually proved, argued, and submitted for decision, but also as to every other matter directly at issue by the pleadings, which the defeated party might have litigated.

RE JUDICATA. — WHILE PAROL EVIDENCE MAY BE RECEIVED TO SHOW what was litigated at the trial, it must be consistent with the record, and cannot be admitted to contradict it. Hence it is proper to exclude evidence tending to show that upon the trial of a former action no testimony was offered in support of a defense, when there is no offer to show that such defense was waived, withdrawn, or struck from the record, and the record in the former action shows that the defendants requested the trial judge to find in their favor upon such defense.

ACTION commenced in June, 1885, to recover for a default occurring in 1879 upon a contract whereby the defendants guaranteed to the plaintiff a dividend of not less than seven per cent per annum for seven years from the 1st of July, 1874, upon certain stocks. Four actions had been previously brought on the same contract, to wit, one in 1876 for a default of that year, one in September, 1878, for the default of the years 1877 and 1878, one in October, 1878, for the same defaults, and one in 1881 for the default of 1876. The first two actions were discontinued October 24, 1878. The fourth action terminated in the judgment for plaintiff April 27, 1882, for the recovery of the installment of 1876. While the fourth action was pending the defendants pleaded as a defense thereto the pendency of the third action, and after judgment was given in the fourth action, they pleaded such judgment

as a bar to the third action. That action, notwithstanding, resulted in a judgment for plaintiff on December 29, 1883. As a defense to present and fifth action, the defendants pleaded the judgment in the fourth action, and that "the cause of action on which such judgment was recovered arose out of the contract set forth in the complaint in the present action and is the same cause of action set forth in the complaint herein." Judgment in favor of plaintiff.

Benjamin F. Tracy and William N. Dykman, for the appellants.

Asa Bird Gardiner and Richard L. Sweezy, for the respondent.

VANN, J. The clause of the contract upon which all of the actions mentioned in the foregoing statement were founded is as follows, viz.: "William P. Clyde & Co. to have the management of said corporation and business, and in consideration thereof, to guarantee Jacob Lorillard a dividend of not less than seven per cent per annum for seven years, and to receive for such management the usual commission of two and one half per cent in, and five per cent out, at each end, on the freights earned."

On the 18th of November, 1881, when the plaintiff began suit for the default of 1876, he was entitled to recover not only for that default, but also for the default of 1879, and no action was then pending for the recovery of either sum. The defendants insist that the contract is indivisible, and that the plaintiff was bound to embrace in that action all guaranteed dividends then due and not in suit.

It is doubtless true, as a general proposition, that each default in the payment of money falling due upon a contract payable in installments may be the subject of an independent action, provided it is brought before the next installment becomes due; but each action should include every installment due when it is commenced, unless a suit is, at the time, pending for the recovery thereof, or other special circumstances exist: *Reformed P. D. Church v. Brown*, 54 Barb. 191; *Beach v. Crain*, 2 N. Y. 86; 49 Am. Dec. 369; *Secor v. Sturgis*, 16 N. Y. 548, 554; *Jex v. Jacob*, 19 Hun, 105; *Bendernagle v. Cocks*, 19 Wend. 207; 32 Am. Dec. 448; *Smith v. Jones*, 15 Johns. 228.

The plaintiff, without denying that this proposition applies to contracts generally, insists that it does not apply to the contract in question, because it has been adjudged that as be-

tween these parties, and as to this contract, successive actions may be brought and independent judgments recovered, even for installments that were due, and not in suit, when the action to recover one thereof, without including the others, was commenced.

The judgment of the superior court, entered April 27, 1882, did not thus adjudicate in express terms, as in form it simply adjudged that the plaintiff recover of the defendants the sum of \$15,021.17. In legal effect, however, as the answer pleads the pendency of the action in the city court, and the judgment recites that the issues were tried, it adjudged that the answer contained no defense. The language used by this court in deciding an appeal brought by the defendant in the city court action is repeated as applicable here.

"To the action commenced in the superior court, in which the plaintiff had his first recovery, the defendants interposed this defense, to wit: 'That at the time of the commencement of this action there was, and now is, another action pending in the city court of Brooklyn, between the same parties as this action, and for the same cause of action as that set forth in the complaint herein.' If the defendants are right in their present contention that the plaintiff was entitled to maintain but one action to recover for all of these dividends, and that he had but one cause of action against them, then that was a good defense to that action. But the plaintiff recovered, and thus it was adjudged that that was not a good defense; that this action was not for the same cause of action as that; that both actions could proceed; and that the pendency of one could be no defense to the other. That adjudication estops and binds these defendants, and they cannot now be heard to say that the two actions were commenced for the same cause of action, or any portion of the same cause": *Lorillard v. Clyde*, 102 N. Y. 59, 64.

The legal effect, therefore, of the judgment invoked as a bar to this action was an adjudication that the contract in question was divisible, so that the installment due July 1, 1876, could be recovered in one action, and the installment due July 1, 1877, in another, although neither was commenced until both installments had become due. The determination that these two installments were severable, although each was separately sued after both were due, necessarily involves the result that any of the installments may be thus separated in suit, because they are all alike, and are created by the same

words. As there was but one promise made by the defendants, the contract is either divisible or indivisible as a whole, and there can be no distinction between the several installments in that regard. Its unity or divisibility was directly at issue in the action pleaded as a bar, and every material question of fact or law involved in an issue must be regarded as determined by the final judgment in the action, so as not to be the subject of judicial investigation again in any subsequent litigation between the same parties. Even if it was wrongfully adjudged that the contract was divisible as to the second, third, and fourth sums falling due, it follows, from the binding force that the law gives to a judgment between the same persons and upon the same point, that as between these parties it is divisible as to the fifth also.

The defendants contend that while the prior judgments may be presumptively a bar, they are not conclusive, and that it was error for the trial court to exclude evidence tending to show that upon the trial of those actions no proof was offered to support the plea of former action pending. There was no offer to show that the defense in question was waived, withdrawn, or stricken from the record, or that the issues were in any way changed. Evidence merely tending to show that the defendants omitted to produce, upon the trial, all the evidence that was admissible in their behalf, was immaterial. A judgment rendered on the merits is co-extensive with the issues upon which it is founded, and is conclusive between the parties thereto, not only as to the matters actually proved, argued, and submitted for decision, but also as to every other matter directly at issue by the pleadings which the defeated party might have litigated: *Jordan v. Van Epps*, 85 N. Y. 427; *Smith v. Smith*, 79 N. Y. 634; *Tuska v. O'Brien*, 68 N. Y. 446-449; *Bloomer v. Sturges*, 58 N. Y. 168, 176; *Clemens v. Clemens*, 87 N. Y. 59, 74; *Doty v. Brown*, 4 N. Y. 71; 53 Am. Dec. 350; *Burt v. Sternburgh*, 4 Cow. 559; 15 Am. Dec. 402; *Phillips v. Berick*, 16 Johns. 136; *Cromwell v. County of Sac*, 94 U. S. 351; *Aurora City v. West*, 6 Wall. 82; Bigelow on Estoppel, 5th ed., 165; Wells on Res Adjudicata, secs. 248-251; Freeman on Judgments, sec. 260.

Moreover, the record in the city court action, which was in evidence when the offer in question was made, shows that the defendants requested the trial judge to find that "all the claims and demands of the plaintiff for installments of dividends for 1874, 1875, 1876, 1877, and 1878, having accrued un-

der one and the same contract prior to the commencement of this action, or that in the superior court of the city of New York, constituted one cause of action. The recovery in the superior court for a part of this cause of action is a bar to this suit. The cause of action is indivisible." This request was refused, and the refusal to find it is a part of the judgment roll. While parol evidence may be received to show what was litigated upon the trial, it must be consistent with the record, and cannot be admitted to contradict it: *Campbell v. Butts*, 3 N. Y. 173; *Davis v. Tallcot*, 12 N. Y. 184, 190; *Wood v. Jackson*, 8 Wend. 9; 22 Am. Dec. 603; *Gardner v. Buckbee*, 8 Cow. 120; 15 Am. Dec. 256; Freeman on Judgments, sec. 275.

As it has been twice adjudged in actions founded on the same contract and brought under the same circumstances as this that the defense now insisted upon is not good, the defendants are bound by the result, even if it was wrong, because the policy of the law does not permit a retrial, between the same parties, of an issue already determined by a prior judgment that is still in force.

The judgment should be affirmed, with costs.

RES JUDICATA — JUDGMENT UPON ONE OF A SERIES OF NOTES. — A judgment against a defendant in an action upon one of several notes given in part payment of the purchase price of machinery is conclusive as to a defense set up and determined therein, so long as the judgment stands unreversed, in an action brought against him upon another of the notes by another party to whom the note has been transferred: *Furneaux v. First Nat. Bank*, 39 Kan. 144; 7 Am. St. Rep. 541. But see *Knorr v. Peerless Reaper Co.*, 23 Neb. 636; 8 Am. St. Rep. 140.

RES JUDICATA. — A judgment is conclusive, not only as to every matter which was actually litigated, but as to any matter which might have been litigated: Note to *Gould v. Sternburg*, 15 Am. St. Rep. 142.

RES JUDICATA — PAROL EVIDENCE. — Wherever the pleadings are so general that several matters might have been litigated in the action, parol evidence is admissible to show that any one or all of these matters were passed upon: Note to *Young v. Rummell*, 38 Am. Dec. 597, 598; note to *Doty v. Brown*, 53 Am. Dec. 356.

ACTION UPON NOTE PAYABLE IN INSTALLMENTS. — Upon a note payable in installments an action may be maintained for each installment as it becomes due: *Bush v. Stowell*, 71 Pa. St. 208; 10 Am. Rep. 694; *Oaples v. Branham*, 20 Mo. 244; 64 Am. Dec. 183. And where several notes maturing at different times are secured by one mortgage, and an action to foreclose is commenced, and based on one of the notes then overdue, the mortgagee may maintain an action at law on another note whenever it matures, and while the foreclosure suit is still pending: *Anderson v. Pilgram*, 30 S. C. 499; 14 Am. St. Rep. 917.

COSULICH v. STANDARD OIL COMPANY.

[122 NEW YORK, 118.]

ONE CONDUCTING A LAWFUL BUSINESS is not under obligation of saving others harmless from the consequences resulting from inevitable accidents. He performs his duty when he uses reasonable care and precaution to save others from injury.

NEGLIGENCE — BURDEN OF PROOF. — He who alleges negligence as a foundation of his right to recovery must point out by evidence the defendant's fault; for the presumption is, until the contrary appears, that every man has performed his duty.

NEGLIGENCE — PRESUMPTION OF NEGLIGENCE DOES NOT ARISE from evidence showing that a tank of oil in the yard of the defendant's petroleum factory exploded, igniting other oil in such yard, a quantity of which oil flowed down a pipe and set fire to plaintiff's vessel, if no contract relations exist between the plaintiff and defendant.

NEGLIGENCE — THERE IS A DISTINCTION BETWEEN ACTIONS FOUNDED IN NEGLIGENCE where a contract relation exists between the parties, and those in which the defendant owed to plaintiff no other duty than to use such ordinary care and caution as the nature of its business demanded to avoid injuries to others. In the latter class of cases, the mere fact that an accident happened to the plaintiff, without more, will not amount to *prima facie* proof of negligence on the part of defendant.

ACTION to recover damages resulting from the loss of the plaintiff's vessel by fire. The defendant was the owner and manager of a petroleum refinery, and the plaintiff's vessel was at a wharf adjacent thereto. The oil within defendant's inclosure got on fire by some means, and a quantity of it, while burning, flowed down a pipe used by the defendant in pumping oil from vessels into its refinery. The burning oil having communicated to a lighter laden with petroleum, the lighter at once exploded, throwing burning oil and sticks upon plaintiff's vessel, by means of which it was set on fire and destroyed. There was no evidence tending to show how the oil got on fire. The witnesses merely testified that they heard a little rumbling and grumbling, and immediately thereafter an explosion. The defendant moved for a nonsuit, which being denied, it rested its case, without offering any evidence. The jury found in favor of the plaintiff.

Lewis Cass Ledyard, for the appellant.

Lorenzo Ullo, for the respondents.

PARKER, J. We are of the opinion that the evidence presented by the plaintiffs failed to establish a cause of action against the defendant, and consequently, that the trial court erred in denying the motion to dismiss the complaint, made after plaintiffs had rested their case.

The fact that the injury sustained by the plaintiffs may have been a direct result of the fire which originated upon the premises of the defendant does not of itself render it liable to respond in damages therefor.

The defendant was not maintaining a nuisance. Its business was lawful, and in its conduct the law does not impose the obligation of saving harmless others from the consequences resulting from the occurrence of inevitable accident, but rather burdens it simply with the duty of using reasonable care and caution to save others from injury. If it omitted that duty, and failed to observe that ordinary care which was incumbent upon it, then, because of such neglect, it became legally chargeable with the damages directly resulting therefrom, but not otherwise: *Loses v. Buchanan*, 51 N. Y. 476; 10 Am. Rep. 623.

As the existence of negligence is an affirmative fact to be established by him who alleges it as a foundation of his right of recovery, it was incumbent upon the plaintiffs to point out, by evidence, the defendant's fault; for the presumption is, until the contrary appears, that every man has performed his duty. This rule has been frequently applied in cases where a fire has spread over and upon the lands of an adjoining owner, to his damage: *Clark v. Foot*, 8 Johns. 421; *Stuart v. Hawley*, 22 Barb. 619; *Lansing v. Stone*, 37 Barb. 15; *Calkins v. Barger*, 44 Barb. 424.

It has likewise been enforced against persons seeking to recover for damages sustained by fires originating from locomotives in operation upon railroads: *Collins v. New York Cent. etc. R. R. Co.*, 5 Hun, 503; 71 N. Y. 609.

But the plaintiffs insist that while negligence cannot be inferred from the fact that the fire originated upon the premises of the defendant, it may be presumed from the proof of an explosion.

It is difficult to discover a reason for holding that proof of the occurrence of a destructive fire in defendant's premises does not raise a presumption of negligence, while proof of the mere fact of an explosion does. It has been said that there is a general disposition among men to preserve their property, and escape liability, and that ordinarily these motives will secure that degree of care and caution which the safety of the public demands, and hence the presumption of duty performed, which, in cases of fire, will protect him until the facts be proven from which negligence can be inferred.

For precisely the same reason he is entitled to the benefit

of such presumption in the case of an explosion where no contractual relation exists. And the plaintiffs must go one step further, and prove the facts from which it can be legitimately inferred that either in construction, repair, or operation he omitted that reasonable care and caution which he should have observed.

As this position is supported by authority, reference will be made to a few of the cases.

In *Losee v. Buchanan*, 51 N. Y. 476, 10 Am. Rep. 623, the action was for damages done to the buildings of the plaintiff by the projection onto his premises of a boiler, resulting in serious injury to several buildings.

The court, in a well-considered opinion delivered by Judge Earl, held,—1. That the plaintiff could not recover, in the absence of proof of fault or negligence on the part of the defendant; 2. That if the explosion was caused by a defect in the manufacture of the boiler, he is not liable, in the absence of proof that such defect was known to him, or was discoverable upon examination, or by the application of known tests.

That case would seem to be controlling here. The plaintiffs proved simply an explosion. The inference is, perhaps, permissible, that the subject of the explosion was the receptacle described as a boiler, tank, still, or agitator, although no witness pretends to assert that it was destroyed or torn down. If it may be inferred that it was the tank, the evidence is silent as to the cause.

It does not point to unskillfulness or carelessness on the part of the employees having the tank in charge, nor suggest defects in construction, or omission to keep in repair, and therefore falls far short of the requirements which the court asserted in the *Losee* case to be essential to a recovery.

In *Walker v. Chicago, R. I., & P. R'y Co.*, 71 Iowa, 658, the plaintiff's property was injured by the explosion of a quantity of dynamite then on a car standing in defendant's yard. The complaint averred that the dynamite was not properly protected; that the fire had caught from passing engines; and that the car was negligently permitted to stand in an improper place. There was no evidence that the fire had caught because the engines were defective in their machinery to prevent fire escaping therefrom, or that the dynamite was not properly protected, or stored in an improper place. The judgment, rendered in favor of the plaintiff, was reversed, the court holding that "the relation between the parties to the action is not

such that the law presumes negligence in the defendant by the mere fact that the plaintiff's property was injured. The burden was upon the plaintiff to show that the place where the car was stored was an improper place. All the light the jury had on the subject was, that the car exploded and the plaintiff's property was injured."

In *Huff v. Austin*, 46 Ohio St. 386, 15 Am. St. Rep. 613, the plaintiff, as an employee of Fay & Co., was at work on the premises of the defendants in helping to set up a saw-mill which the defendants had purchased of Fay & Co. While so at work, a steam-boiler, owned and used by the defendants on the premises to run the saw-mill, exploded and injured the plaintiff. The plaintiff had a verdict, which was reversed, the court holding that proof of the mere fact of an explosion does not raise a presumption of negligence on the part of the defendants.

This precise question was carefully considered by the court of last resort in Tennessee in *Young v. Bransford*, 12 Lea, 232. Plaintiff's intestate, while in defendant's grist-mill, was killed by the explosion of defendant's boiler. The trial court, in his charge to the jury, said: "When the killing is proved to have been done by the explosion of defendant's boiler, the burden is thrown upon them to show that they were guilty of no negligence, and that the accident was unavoidable. So that while the burden of proof is upon the plaintiff to make out her case in the first instance, when she has shown the explosion and killing, the burden then shifts upon the defendants to exonerate themselves from presumed negligence by showing that they were in fact guilty of no negligence, and upon this point, whether there is negligence or not, your verdict must turn." This was held to be error, for which a reversal was had.

The principles stated and authorities cited establish, as we think, that the burden of proof resting upon the plaintiff was not well borne by him when he rested his case; and we should be content to end the discussion at this point but for the argument of the learned general term, which may be profitably considered further.

The court failed to recognize a distinction, which has been carefully guarded by the courts of this state as well as by nearly all other jurisdictions in this country, between actions founded in negligence where a contract relation existed between the parties, and those in which the defendant owed no

other duty than to use such ordinary care and caution as the nature of his business demanded to avoid injury to others.

Its omission to do so may have been induced by the opinion of the court in *Ross v. Stevens and Condit Trans. Co.*, 11 Fed. Rep. 488, which was cited with approval. In that case it is said "that the presumption originates from the nature of the act, and not from the nature of the relations between the parties."

This assertion does not seem to have been well considered. In actions founded on negligence, the *onus* of establishing it rests upon the plaintiff. In determining whether he has sustained this burden, it is necessary in certain cases to inquire whether an inference of the fact of negligence can be drawn from other facts proven. When it can be, then it is said that a presumption of the fact of negligence is permissible. And of necessity it embraces not only the doing or omission to do the thing complained of, but also the relations of the parties; i. e., whether in that which he did or omitted to do he failed to discharge some duty owing to the plaintiff. *Beck v. Carter*, 68 N. Y. 283, 23 Am. Rep. 175, furnishes an illustration in point. It is there held that "where the owner of land expressly or by implication invites others to come upon his premises, if he permits anything in the nature of a snare to exist thereon, he is responsible for an injury resulting therefrom to one availing himself of the invitation. But if he gives but a bare permission to cross the premises, the licensee takes the risk of accidents while using the premises in the condition in which they are. In both cases the act is the same; but in the one case he owes a duty not to maintain a snare; in the other, not. In view of the relations of the parties, he is held to be negligent in the first case, but not in the second.

Sometimes, it is true, the duty which the defendant owes to the plaintiff is of such a nature that proof of the happening of the accident under certain circumstances and given conditions will be of such legal value as to afford presumptive evidence of negligence, and cast upon the defendant the burden of explanation.

This rule has been applied to the carrier of passengers, especially in conveyances propelled by steam, where the consequences of an accident are frequently fatal to human life, and the public interests require that in such cases the carrier shall use every precaution which human skill and foresight can provide to prevent accident and its results. Even in those cases

there must be reasonable evidence of negligence before a defendant can be called upon to relieve itself from the presumption of negligence.

"But when the thing causing the injury is shown to be under the control of the defendant, and the accident is such as in the ordinary course of business does not happen if reasonable care is used, it does, in absence of explanation by the defendant, afford sufficient evidence that the accident arose from want of care on its part": *Breen v. New York C. & H. R. R. Co.*, 109 N. Y. 297; 4 Am. St. Rep. 450; *Seybolt v. New York, L. E., & W. R. R. Co.*, 95 N. Y. 562; 47 Am. Rep. 75.

But "it is believed," says Mr. Thompson, "that it is never true, except in contractual relations, that the proof of the mere fact that the accident happened to plaintiff, without more, will amount to *prima facie* proof of negligence on the part of the defendant": 2 Thompson on Negligence, 1227.

This rule is recognized in *Huff v. Austin*, 46 Ohio St. 336, 15 Am. St. Rep. 613, the court saying: "Whether the defendants can be held liable for the injury caused by the explosion of the boiler owned and used by them on their own premises, without affirmative proof of negligence beyond the mere fact of the explosion, is not to be determined by the rule of negligence governing the common carriers of passengers and goods."

To the same effect is the reasoning of Mr. Justice Field in the *Nitro-Glycerine Case*, 15 Wall. 524.

The supreme court of Indiana recognizes that carrier cases constitute an exception to the general rule, in *Wabash, S. L., & P. R'y Co. v. Locke*, 112 Ind. 404; 2 Am. St. Rep. 193. After a statement of the extent of the care which the defendant was bound to observe for the protection of the plaintiff and the public, the court continued: "The case, therefore, stands upon a different footing from the cases which involve the duties of carriers who contract to carry passengers safely to a particular destination. In such cases proof of an injury ordinarily establishes a *prima facie* case of negligence in favor of a passenger, which the carrier must overcome."

Now, the cases cited by the general term, in which the rule *res ipsa loquitur* has been enforced against defendants, are nearly all passenger cases, and therefore do not support the plaintiff's position. *Weidmer v. New York E. R. R. Co.*, 41 Hun, 284, is an exception, but that case has since been reversed by this court (114 N. Y. 462), it being held that the

rule *res ipsa loquitur* was not applicable to the situation presented.

Mullen v. St. John, 57 N. Y. 567, 15 Am. Rep. 530, the other exception requiring notice, was for damages sustained by the falling of a brick wall upon the plaintiff while passing on the sidewalk.

Now, while the court discussed the case from the stand-point of presumptions in the law of evidence, it will be observed that there was far more than the mere happening of the accident which was held to give rise to it in that case. There were certain conditions proven, which, taken in connection with the fall of the wall, permitted an inference of fact that the defendant was negligent. Buildings properly constructed do not fall without adequate cause. So the plaintiff, to establish his cause of action, proved, — 1. That the wall did fall; and 2. That there were no special circumstances of storm or violence to produce that result; and the court held that the falling, under the circumstances and conditions proven, raised a presumption of negligence.

It seems to be apparent that the rule *res ipsa loquitur* cannot be invoked in support of the judgment under review.

If it could be, it would in practical effect subvert the hitherto well-settled law that a man may upon his own lands build factories and dams and employ the use of machinery without liability for any damage which may accidentally and unavoidably ensue to his neighbor. For it would necessarily result in making him in effect the insurer against injury happening from the explosion of boilers or the breaking of machinery upon his premises.

Steam and machinery are now so universally and usefully employed in factories and upon farms as to make it the part of wisdom not to relax the long-established rule that he who alleges injury sustained through the negligence of his neighbor, with whom he has no contract relation, and who owes to him no other duty than that he shall observe reasonable care to prevent injury, must prove the facts from which an inference of the particular act of negligence charged can be drawn.

The judgment should be reversed.

NEGLECT — BURDEN OF PROOF. — The burden of proof of negligence is upon him who alleges it: Note to *Blanchard v. Lake Shore etc. Ry Co.*, 9 Am. St. Rep. 637, 638.

NEGLIGENCE. — One engaged in the prosecution of a lawful act is not liable for an accidental injury occurring during the performance thereof, when due care is exercised: *Williams v. Michigan C. R. R. Co.*, 2 Mich. 259; 55 Am. Dec. 59. When there is no negligence, unskillfulness, or malice in an act done, a person cannot be held responsible in damages for a proper exercise of a lawful right: *Fuhr v. Reichart*, 8 Wis. 255; 76 Am. Dec. 237.

JEMISON v. CITIZENS' SAVINGS BANK OF JEFFERSON, TEXAS.

[12: NEW YORK, 186.]

CORPORATION, NOTICE OF POWERS OF. — He who deals with a corporation is chargeable with notice of its powers and the purposes for which it was formed, and when dealing with its agents or officers, is bound to know the extent of their powers and authority.

SAVINGS BANKS — CONTRACTS ULTRA VIRES. — Speculative contracts entered into for the sale and purchase of stocks by a savings bank at the stock board, or elsewhere, subject to the hazard or contingencies of gain or loss, are *ultra vires*, and a perversion of the powers conferred by its charter.

CONTRACTS OF CORPORATIONS ARE ULTRA VIRES WHEN they involve adventures or undertakings outside and not within the scope of the powers given by their charters.

CORPORATIONS. — PLEA OF ULTRA VIRES SHOULD PREVAIL unless it will defeat justice or accomplish a legal wrong.

CORPORATION ACTING FOR A PARTY WHOSE NAME IS NOT DISCLOSED must be regarded as acting for itself, and its act or contract treated as invalid if it would have been invalid had it professed to act for itself. Hence if a savings bank having no power to deal in the purchase and sale of cotton for future delivery gives orders to a commission merchant to purchase for such delivery, stating that it is acting for good and responsible customers, but not disclosing their names, and the merchant, in response to such order, purchases such cotton, he cannot recover of the bank either his commissions or his losses sustained by the purchase, where no cotton has been delivered to the bank, and the purchase was made in the name of the merchant.

CORPORATION — ULTRA VIRES — ESTOPPEL. — Corporation is not estopped from urging that a contract is *ultra vires* and void, if it remains executory, and the corporation has not received the benefit or proceeds thereof, as where the contract is for the purchase of cotton on its account, and such cotton, though purchased for such account, is bought in the name of the other contracting party, and is never delivered to the corporation.

Francis C. Barlow, for the appellants.

Benjamin H. Bristow and William D. Guthrie, for the respondent.

HAIGHT, J. The plaintiffs were commission merchants and members of the Cotton Exchange of the city of New York.

The defendant was a savings bank and trust corporation organized under the laws of Texas.

This action was brought to recover commissions, and for money claimed to have been expended for the defendant on the purchase and sale of cotton futures.

The defense was, that the defendant, as a savings bank and trust corporation, had no power or authority to deal in the purchase and sale of cotton for future delivery, or in contracts for the purpose of speculation; that in the transaction alleged in the complaint it acted as the agent of one Albert P. Clopton, of Jefferson, Texas, and that the fact that he was the principal for whom the defendant acted was disclosed and well known to the plaintiffs prior to the time of the transaction referred to.

Whilst the fact distinctly appears from the correspondence between the parties that the defendant was acting for "good, responsible customers," the general term was of the opinion that this defense could not be sustained, for the reason that the defendant did not disclose the name of its principal at the time of the giving of the orders complained of for the purchase and sale of cotton futures. Had this defense been sustained, the principal, and not the defendant, his agent, would have been liable. Without stopping to consider the evidence, we shall assume that this defense was not established, and proceed to consider the question as to whether the defendant was liable as principal.

Transactions between the parties commenced in January, 1879, by a letter from J. H. Parsons, as cashier of the defendant, asking the plaintiffs the amount of margin and commission they required for the purchase of cotton futures. The plaintiffs answered, giving the amount, and this was followed by an order by telegraph from Parsons, as cashier, under date of February 10th, to buy one hundred bales, June delivery, and on the same day he wrote the plaintiffs that the order was made for one of their customers, who had deposited \$250, as per their favor of the 27th ult. Other orders followed, the final result of which was a loss, to recover which this action was brought. At the time Parsons was the cashier of the defendant, possessing the powers and duties incident to the office under the charter, constitution, and by-laws, having the general charge of the business of the bank and the supervision of the concern, and inasmuch as the answer alleges that the transactions referred to in the complaint

were had between the plaintiffs and the defendant acting as agent, we shall treat him as possessing all of the authority to act in the premises that the directors of the defendant had the power to give. This brings us to the question whether or not the defendant had the power to make the orders in question. The defendant was incorporated and chartered in 1871 by an act of the legislature of the state of Texas entitled "An act to incorporate the Citizens' Savings Bank of Jefferson, Texas." The act, among other things, provides that "the general business and object of this corporation shall be to receive on deposit or in trust such sum or sums of money as may, from time to time, be offered therefor by tradesmen, merchants, clerks, laborers, servants, and others, to be repaid to such depositors when demanded, at such times, with such interest, and under such regulations as the board of directors may, from time to time, prescribe"; and also, "this corporation may loan money according to the constitution and laws of the state, or may discount in accordance with bank usages, taking such security therefor, either real or personal, as the directors may deem sufficient. Said corporation shall have power to borrow money, buy and sell exchange, bullion, bank notes, government stocks, and other securities." The act further provides that the business of the corporation shall be managed by twelve directors.

Corporations are artificial creations, existing by virtue of some statute, and organized for the purposes defined in their charters. A person dealing with a corporation is chargeable with notice of its powers and the purposes for which it is formed, and when dealing with its agents or officers, is bound to know the extent of their power and authority. A corporation necessarily carries its charter wherever it goes, for that is the law of its existence. It follows that the plaintiffs must have known, or are chargeable with knowledge, of the corporate powers of the defendant, and of the extent to which its cashier could bind the corporation: *Alexander v. Cauldwell*, 88 N. Y. 480; *Hoyt v. Thompson*, 19 N. Y. 207-222; *Relfe v. Rundle*, 108 U. S. 222-226; *Davis v. Old Colony R. R. Co.*, 131 Mass. 258-260; 41 Am. Rep. 221; *Leonard v. American Ins. Co.*, 97 Ind. 299.

Savings banks are designed to encourage economy and frugality among persons of small means, and are organized with restrictions and provisions intended to secure depositors against loss. Speculative contracts entered into for the sale

or purchase of stock by a savings bank at the stock board or elsewhere, subject to the hazard and contingency of gain or loss, are *ultra vires*, and a perversion of the powers conferred by its charter: *People etc. v. Mechanics' & T. S. Inst.*, 92 N. Y. 7-9; *Sistare v. Best*, 88 N. Y. 527-531. Contracts of corporations are *ultra vires* when they involve adventures or undertakings outside and not within the scope or power given by their charters. The acts under which they are organized were framed in view of the rights of the public and the interests of the stockholders. As artificial creations, they possess only the powers with which they were endowed. An act may be *malum in se* or *malum prohibitum*, or an act may not be immoral or prohibited by any statute, and still it may be in excess of the powers vested in the officers of a corporation, unauthorized, and prejudicial to the stockholders. In either case, the plea of *ultra vires* should prevail, unless it would defeat justice or accomplish a legal wrong: *Huntington v. National Savings Bank*, 96 U. S. 388; *Thomas v. West Jersey R. R. Co.*, 101 U. S. 71; *Nassau Bank v. Jones*, 95 N. Y. 115; 47 Am. Rep. 14; *Leslie v. Lorillard*, 110 N. Y. 519.

As we have seen, the defendant was chartered for the purpose of receiving on deposit or in trust such sums of money as may, from time to time, be offered by tradesmen, merchants, clerks, laborers, servants, and others. It was authorized to loan these moneys according to the constitution and laws of the state, and to discount in accordance with bank usages, taking such security therefor, either real or personal, as the directors may deem sufficient. In addition thereto, the defendant was given power to borrow money, buy and sell exchange, bullion, bank notes, government stocks, and other securities. The authority here given to buy and sell exchange, bullion, bank notes, government stocks, and other securities does not embrace or include speculative contracts in cotton futures, any more than it does hay, oats, provisions, or dry-goods. The exchange, bullion, bank notes, securities, etc., authorized are those of fixed value, current in the market, and not subject to the control of speculators. Whilst the buying and selling of cotton to be delivered in the future may not ordinarily be immoral or prohibited by any statute, it is not included in the powers given to the defendant by its charter. The transaction in question was prejudicial to its stockholders, and tended to endanger and destroy the safeguards provided for the depositors. The stockholders and

depositors had the right to have their funds invested in accordance with the provisions of the charter and the constitution and laws of the state, and in so far as this right was violated by the transaction in question, it was a misappropriation of the funds, and immoral.

It is contended that the defense of *ultra vires* is not available in this case, for the reason that the contract had been executed on the part of the plaintiffs, and that the defendant is estopped from setting up the defense. In the case of *Whitney Arms Co. v. Barlow*, 63 N. Y. 62, the plaintiff was a corporation organized for the purpose of manufacturing every variety of fire-arms and other implements of war, and all kinds of machinery adapted to the construction thereof. It entered into a contract with the American Seal Lock Company to manufacture and deliver ten thousand locks. The locks having been delivered, it was held that the contract was fully executed, and that the plea of *ultra vires* would not prevail as a defense to an action brought to recover the contract price. We do not question the rule thus invoked. It has been repeatedly declared in other cases, as, for instance, in *Parish v. Wheeler*, 22 N. Y. 494, in which it was held that a railroad company, having purchased and received a steamboat, could be compelled to pay for it, although the power to purchase such boat was not included in its charter. But this doctrine has no application to executory contracts which are sought to be made the foundation of an action, or to contracts that are prohibited as against public policy, or immoral: *Nassau Bank v. Jones*, 95 N. Y. 115; 47 Am. Rep. 14; *Pittsburgh, C., & St. L. R'y Co. v. Keokuk & H. B. Co.*, 131 U. S. 371-389.

In the case at bar, the transaction, as we have seen, was not only immoral and in violation of the rights of the stockholders and depositors, but the defendant had received nothing by virtue of it. The cotton had been purchased by the plaintiffs in their own name, they taking title thereto, and holding it upon the defendant's account. It was purchased under the rules of the Cotton Exchange of the city of New York, in which the members doing business therein with other members act as principals, and are liable as such. The most that can be claimed is, that they held the cotton, or the contracts therefor, subject to the call or order of the defendant. There had been no delivery of any cotton or property of any kind, or transfer of any title to such property, to the defendant. If the steamboat

had never been delivered to the railroad company so as to transfer the title thereto, or if the ten thousand locks had never been delivered to the American Seal Lock Company, very different questions would have been presented in the cases to which we have called attention. We consequently are of the opinion that, under the circumstances of this case, the defense of *ultra vires* is still available to the defendant.

The claim is made on behalf of the appellants that the defendant, in making the orders, acted as an agent for an undisclosed principal, and is therefore liable as such. If the defendant had no power to engage in the business as principal, we do not understand what right it had to do so as an agent; but conceding that it was an agent, and that the orders were made for and on behalf of Clopton, then this action should have been brought against Clopton instead of the defendant. But it is claimed that the defendant neglected to disclose its principal at the time of making the orders, and for that reason it is liable; but if it neglected to disclose its principal, so far as this action with the plaintiffs is concerned, it must be regarded as principal, and liable as such; and if a principal, then the question of *ultra vires* arises. The plaintiffs cannot sustain their action upon the two theories, for they lead in different directions. They cannot proceed upon the theory that the defendant was an agent, for the purpose of avoiding the question of *ultra vires*, and then upon the theory that the defendant was a principal, for the purpose of establishing a right to recover. Undoubtedly a person may in fact be an agent and still bind himself as a principal; but if he is proceeded against as a principal, he is entitled to all of the rights and privileges that the law gives to a person occupying that position.

We consequently are of the opinion that the judgment should be affirmed, with costs.

CORPORATIONS. — Persons dealing with a corporation through its agents must take notice, — 1. Of the extent of the powers of the corporation; 2. Of the extent of the authority of the agents: *Credit Co. v. Howe Machine Co.*, 54 Conn. 357; 1 Am. St. Rep. 123.

CORPORATIONS. — As to the effect of a plea of *ultra vires* in the case of executory contracts entered into by a corporation, see note to *Page v. Heineberg*, 94 Am. Dec. 386; and compare note to *Leavitt v. Palmer*, 51 Am. Dec. 341, 342.

LE BARRON v. BABCOCK.

[122 NEW YORK, 188.]

Co-TENANCY. — When one of several tenants in common of a farm, all being of full age, occupies it, and takes in the usual course of husbandry the annual profits thereof, without having ousted or denied the rights of his co-tenants, he is not liable to account to them, or to any of them, for the profits so taken.

Co-TENANCY. — **TENANT IN COMMON WHO GROWS AND SEVERES CROPS,** such as oats and grass, while he is in sole possession of the lands of the co-tenancy, becomes the exclusive owner of such crops, where his occupancy has been permissive, and without ousting his co-tenants; and if his co-tenants take such crops away, they become answerable to him for the full value thereof.

W. S. Thrasher, for the appellant.

Morris and Lambert, for the respondents.

FOLLETT, C. J. March 19, 1882, Lineas Le Barron, the elder, died intestate, seised of a farm of 233 acres, and leaving eleven children, his only heirs, one of whom is the plaintiff, and another is the wife of Alphonso House, one of the defendants. The plaintiff was the administrator of his father's estate, and being in possession of the farm in the year 1885, he plowed two and a half acres of land and sowed it to oats. Upon the farm there was about forty acres of meadow land. In August of that year he cut these oats, and also the grass on about fifteen acres of the meadow. He left the oats in the swath to dry, and the hay, which had been partly dried, he had raked into windrows. No one but the plaintiff had bestowed any labor on the grain or hay, or on the farm whereon they grew. These products being in this situation, the defendants entered in the night-time and drew away the oats, and entered in the daytime and drew away the hay, claiming to do so in the right of Mrs. House and by her direction. The plaintiff forbade the removal of the property, but openly admitted the right of any one of his co-tenants to cut and take his or her share of the standing grass from the meadow. None of the tenants had ever been excluded from the farm, nor had the right to possess or enjoy it ever been denied to them, or to any one of them.

This action was brought to recover the value of the hay and oats, upon the theory that the defendants were liable in trover, and at circuit it was held that they were so liable, and the plaintiff had a verdict for the value of both, but their values were not separately assessed. The judgment entered upon

the verdict was reversed at general term, where it was held that the plaintiff was the sole owner of the oats, and could recover their value, but that he was a mere tenant in common of the hay, and could not recover its value of his co-tenant who had carried it away.

The oats and hay were personal chattels, the former being such before as well as after they were cut, and the latter became such when severed from the meadow: 2 Stephen's Commentary, 8th ed., 212. If they were owned in common by the plaintiff and Mrs. House, it was not a conversion in law for the defendants, acting by her (a co-tenant's) authority, to merely draw them away: *Carr v. Dodge*, 40 N. H. 404; *Ballou v. Hale*, 47 N. H. 347; 93 Am. Dec. 438; *Russell v. Allen*, 13 N. Y. 173; *Loddell v. Stowell*, 51 N. Y. 70; Freeman on Cotenancy, sec. 306. But if the plaintiff owned the products in his own right, then the defendants' act in carrying them away was a conversion in law, and they are liable for the damages.

When one of several tenants in common of a farm (all being of full age) occupies it, and has taken, in the usual course of husbandry, the annual products thereof without having entered into any contract in respect to its use, and without having ousted or denied the rights of any of his co-tenants, he is not liable to account to them, or to any one of them, for its use, or for the products so taken: *Woolever v. Knapp*, 18 Barb. 265; *Wilcox v. Wilcox*, 48 Barb. 327; *Dresser v. Dresser*, 40 Barb. 300; *Roseboom v. Roseboom*, 15 Hun, 309; 81 N. Y. 356; *Zapp v. Miller*, 109 N. Y. 51, 57; *Henderson v. Eason*, 17 Ad. & E. 701; 4 Kent's Com. 369; Freeman on Cotenancy, sec. 286. The judgments which hold that a tenant in common of farming land who, while in peaceable possession, takes and uses the products which have grown while so in possession is not liable to account for their value to his co-tenant rest necessarily on the assumption that he becomes the sole owner of such products; for if a tenant in common of a chattel uses it up or sells it for his own exclusive benefit without the express or implied assent of his co-tenants, he is liable to them for its conversion: *Wilson v. Reed*, 3 Johns. 175; *Nowlen v. Colt*, 6 Hill, 461; 41 Am. Dec. 756; *Dyckman v. Valiente*, 42 N. Y. 560; Freeman on Cotenancy, secs. 307, 308. When a co-tenant of such lands peaceably takes the products grown during his possession, there comes a time when he is vested with the sole title, which cannot be later than when in the due course of husbandry they are peaceably and in good faith

severed by him from the common estate on which they were grown. If they do not then become the individual property of the co-tenant who grew and severed them, it is difficult to see what subsequent act he could perform which would vest him with the title. Storing the hay and grain in a barn would not strengthen his title, and unless it becomes perfect when the products are severed, a co-tenant out of possession can lie by and permit the one in possession to rear and prepare crops for market and then peaceably take them whenever or wherever he can, or, under certain circumstances, of the purchaser, so long as the property can be traced. This would not be a convenient nor an equitable rule, and we find no authority which justifies the court in declaring it to be the legal one.

The plaintiff, having in the due course of husbandry grown and severed the grass and oats while being with the acquiescence of his co-tenants legally and peaceably in possession of the land whereon the grew, became the sole owner of them, and the defendants, by taking them away, became liable for their value: *Calhoun v. Curtis*, 4 Met. 413; 38 Am. Dec. 380; *Brown v. Wellington*, 106 Mass. 318; 8 Am. Rep. 330; *Bird v. Bird*, 15 Fla. 424; 21 Am. Rep. 296; *Henderson v. Eason*, 17 Ad. & E. 701; 1 Domat's Civil Law, Cushing's ed., 952.

The order should be reversed, and judgment entered on the verdict affirmed, with costs.

CO-TENANCY — RIGHTS OF OCCUPYING TENANT. — Sole use and occupancy of common property by one co-tenant does not create the relation of landlord and tenant, nor render such tenant liable for rents: *Hamby v. Wall*, 48 Ark. 135; 3 Am. St. Rep. 218, and note; note to *Barly v. Friend*, 78 Am. Dec. 665, 666. See also *West v. Weyer*, 46 Ohio St. 66; 15 Am. St. Rep. 552, and note; *Fulmer's Appeal*, 128 Pa. St. 24; 15 Am. St. Rep. 662, and note.

VILLAGE OF CARTHAGE v. FREDERICK.

[122 NEW YORK, 268.]

MUNICIPAL CORPORATION POSSESSES, IN ADDITION TO THE POWERS SPECIFICALLY CONFERRED upon it by its charter, such further powers as are necessarily incident to or may be fairly inferred from those powers, including all that are essential to the declared objects of its existence.

MUNICIPAL CORPORATION. — AN ORDINANCE ADOPTED BY A MUNICIPAL CORPORATION pursuant to authority expressly delegated to it by the legislature has the same force within the corporate limits as a statute passed by the legislature itself. If, however, the power to legislate is general or implied, and the manner of exercising it is not specified, there must be a reasonable use of such power, or the ordinance may be declared invalid by the courts.

MUNICIPAL CORPORATIONS — POWER TO ENACT ORDINANCES. — An ordinance making it unlawful for any owner, occupant, or person having charge of any lot to suffer or permit any snow, ice, or other obstruction to collect and remain on any sidewalk fronting on such lots, so as to impede, obstruct, or render it dangerous to public travel, later than ten o'clock in the forenoon of any day after the same shall have fallen or collected thereon, and imposing a fine upon any one offending against such ordinance, is valid and enforceable, where the charter of the municipality authorizes it to enact ordinances to provide for keeping the sidewalks clear from ice, snow, and other obstructions, and to carry into effect the purposes of the corporation.

CONSTITUTIONAL LAW — POLICE POWER. — The constitution presupposes the existence of the police power, and is to be considered with reference to that fact. The police power is not limited by the clause of the constitution prohibiting the taking of private property without compensation. Every citizen holds his property subject to the proper exercise of this power, either by the state legislature directly or by public and municipal corporations to which the legislature may delegate it.

CONSTITUTIONAL LAW. — A MUNICIPAL ORDINANCE REQUIRING THE OCCUPANTS OR OWNERS OF PROPERTY TO REMOVE ICE, SNOW, AND OTHER OBSTRUCTIONS falling or collecting thereon, and imposing a penalty for their failure to do so, is a valid exercise of the police power, and is not forbidden by the clause of the constitution prohibiting the taking of private property without compensation.

ACTION to recover a penalty for the violation of a municipal ordinance, in the words and figures following: "Sec. 29. It shall not be lawful for any owner, occupant, tenant, or any person having the charge or control of any premises, lot, tenement, or manufacturing establishment situated within the village of Carthage to suffer or permit any snow, ice, or other substance to collect and remain on any sidewalk fronting on or belonging to said premises so as to impede, obstruct, or render dangerous public travel upon such walks later than ten o'clock in the forenoon of any day after the same shall have fallen or collected thereon, or for more than two hours after being notified by the president or any of the trustees of said village to remove the same. Any person or persons offending against the provisions of this act shall be liable to pay a fine of not less than one dollar and not to exceed ten dollars for each and every offense, to be sued for and collected the same as other penalties, with costs of suit." There was no doubt that the ordinance has been passed and published in the form required by law, and that the defendant had violated it by suffering snow to collect and remain upon the sidewalk in front of the premises occupied by him, and after ten o'clock in the forenoon of the day after which it had fallen, and that public travel over the sidewalk had thereby been impeded and

rendered dangerous. Judgment was rendered by the trial court in favor the plaintiff, and was affirmed on appeal to the general term.

Kilby and Kellogg, for the appellant.

Watson M. Rogers, for the respondent.

VANN, J. A municipal corporation possesses not only the powers specifically conferred upon it by its charter, but also such as are necessarily incident to or may fairly be implied from those powers, including all that are essential to the declared object of its existence: *Le Couteulx v. City of Buffalo*, 33 N. Y. 333; *Ketchum v. City of Buffalo*, 14 N. Y. 356; *Buffalo etc. R. R. Co. v. City of Buffalo*, 5 Hill, 209; 1 Dillon on Municipal Corporations, sec. 89; Angell and Ames on Corporations, 346, 364; 2 Kyd on Corporations, 149.

An ordinance adopted by such a corporation, pursuant to authority expressly delegated by the legislature, has the same force within the corporate limits as a statute passed by the legislature itself: *Village of Gloversville v. Howell*, 70 N. Y. 287; *City of Brooklyn v. Breslin*, 57 N. Y. 591, 596; *Corporation of the Brick Presbyterian Church v. Mayor etc. of New York*, 5 Cow. 538, 541; *McDermott v. Board of Police*, 5 Abb. Pr. 422; Grant on Corporations, 77. Where, however, the power to legislate is general or implied, and the manner of exercising it is not specified, there must be a reasonable use of such power, or the ordinance may be declared invalid by the courts: *Dunham v. Trustees of Rochester*, 5 Cow. 462; *Cronin v. People*, 82 N. Y. 318; 37 Am. Rep. 564; *Commissioners of Northern Liberties v. N. L. Gas Co.*, 12 Pa. St. 318; *Mayor etc. v. Thorne*, 7 Paige, 261; *In re Frazee*, 63 Mich. 396; *Town of State Center v. Barenstein*, 66 Iowa, 249; *City of Mankato v. Fowler*, 32 Minn. 364; *City of Clinton v. Phillips*, 58 Ill. 102; 11 Am. Rep. 52; 1 Dillon on Municipal Corporations, sec. 328; Cooley's Constitutional Limitations, 243.

The trustees of the village of Carthage were authorized by the act of incorporation to enact ordinances for various purposes, and, among others, to prevent encumbering the sidewalks with any substance or material whatever; to provide for keeping them clear from snow, ice, dirt, and other obstructions; to direct the sweeping and cleaning of streets in said village by the persons owning or occupying the premises fronting thereon; "and, generally, the said trustees" were empowered to pass such ordinances, "not inconsistent with the

laws of the United States and of this state, as may be necessary and proper for carrying into effect the purposes of said corporation, and the powers and privileges granted" by said act, and not inconsistent therewith, "and for the enforcement of such by-laws, ordinances, rules, and regulations." They were also authorized to prescribe such penalties as they should deem proper for a violation thereof, not exceeding one hundred dollars for each offense: Laws of 1869, c. 834, 1875-1878. By a later act, exclusive jurisdiction was conferred upon the police justice of the village in all actions brought to recover fines or penalties for a violation of the charter, or of the ordinances passed thereunder: Laws of 1872, c. 564, 1872.

We think that the special grant of power to enact ordinances to prevent encumbrances upon the sidewalks, and to provide for keeping them free from snow, when considered in connection with the general grant of power to pass all such ordinances as are necessary for carrying into effect the purposes of the corporation, and the powers conferred by the charter, is sufficient to authorize the adoption of the ordinance in question. It is fair, impartial, and general, is consistent with the general legislation of the state, and is a reasonable exercise of the powers conferred by the legislature: *Mayor etc. v. Williams*, 15 N. Y. 502; *People v. Mattimore*, 45 Hun, 448.

The defendant, however, insists that said ordinance is unconstitutional, because it assumes to authorize the taking of private property for public use without just compensation: Const. N. Y., art. 1, sec. 6.

It is made the duty of the legislature, by the constitution now in force, to provide for the organization of cities and villages, but, as a recent writer has said: "The right of the legislature, in the entire absence of authorization or prohibition, to create towns and other inferior municipal organizations, and to confer upon them the powers of local government, and especially of local taxation and police regulation usual with such corporations, would always pass unchallenged": Cooley's Constitutional Limitations, 5th ed., 228. During the early history of the state, when the constitution was silent upon the subject, cities and villages were incorporated by the legislature, and extensive powers of local legislation were conferred upon them, including the right to pass by-laws or ordinances, to inflict fines and penalties for their violation, and to collect

the same through the courts: Laws of 1785, c. 83; Laws of 1790, c. 49; Laws of 1794, c. 36. As early as 1785, by the charter of the city of Hudson, the right to legislate in regard to the "police" power was expressly conferred: Laws of 1785, c. 83, sec. 11. This power was then well known to the common law, and twenty years before had been defined by Blackstone as "the due regulation and domestic order of the kingdom, whereby the individuals of the state, like members of a well-governed family, are bound to conform their general behavior to the rules of propriety, good neighborhood, and good manners, and to be decent, industrious, and inoffensive in their respective stations": 4 Bla. Com. 162. Municipal corporations have exercised this power, *eo nomine*, for time out of mind, by making regulations to preserve order, to promote freedom of communication, and to facilitate the transaction of business in crowded communities. Compensation has never been a condition of its exercise, even when attended with inconvenience or pecuniary loss, as each member of a community is presumed to be benefited by that which promotes the general welfare. All authorities agree that the constitution presupposes the existence of the police power, and is to be construed with reference to that fact: 2 Hare's American Constitutional Law, 766; Anderson's Law Dict., tit. Police.

Mr. Sedgwick, in his work on constitutional law, says that "the clause prohibiting the taking of private property without compensation is not intended as a limitation of the exercise of those police powers which are necessary to the tranquility of every well-ordered community, nor of that general power over private property which is necessary for the orderly existence of all governments. It has always been held that the legislature may make police regulations, although they may interfere with the full enjoyment of private property, and though no compensation is given": Sedgwick on Statutory and Constitutional Law, 435.

A recent writer upon the limitations of police power says, that "where the letter of the constitution would prohibit police regulations, which, by all the principles of constitutional government, have been recognized as beneficent and permissible restrictions upon the individual liberty of action, such regulations will be upheld by the courts, on the ground that the framers of the constitution could not possibly have intended to deprive the government of so salutary a power, and hence the spirit of the constitution permits such legislation, although

a strict construction of the letter prohibits": Tiedeman's Limitation of Police Power, 12. "A large part of the police power of the state is exercised by the local governments of municipal corporations, and the extent of their police powers depends upon the limitations of their charters": Tiedeman's Limitation of Police Power, 638. "The limit to the exercise of the police power can only be this: the legislation must have reference to the comfort, the safety, or the welfare of society, and it must not be in conflict with the provisions of the constitution": Potter's Dwarris on Statutes, 458.

Judge Dillon, in his work on municipal corporations (vol. 1, 212), says that "every citizen holds his property subject to the proper exercise of this (police) power, either by the state legislature directly, or by public or municipal corporations to which the legislature may delegate it. . . . It is well settled that laws and regulations of this character, though they may disturb the enjoyment of individual rights, are not unconstitutional, though no provision is made for compensation for such disturbances. . . . If one suffers injury, it is either *damnum absque injuria*, or, in the theory of the law, he is compensated for it by sharing in the general benefits which the regulations are intended and calculated to secure." The courts have been equally emphatic in their declarations upon the subject. In *Thorpe v. Rulland etc. R. R. Co.*, 27 Vt. 140, 62 Am. Dec. 625, the court said: "There is also the general police power of the state, by which persons and property are subjected to all kinds of restraints and burdens in order to secure the general comfort, health, and prosperity, of the perfect right in the legislature to do which no question ever was, or upon acknowledged general principles ever can be, made."

Chief Justice Shaw, in deciding a case involving the collection of a penalty imposed for the violation of a municipal ordinance requiring the owners or occupants of houses bordering on streets to remove the snow from their respective sidewalks within a specified time, used this significant language: "It is not speaking strictly, to characterize this city ordinance as a law levying a tax, the direct or principal object of which is the raising of revenue. It imposes a duty upon a large class of persons, the performance of which requires some labor and expense, and therefore indirectly operates as a law creating a burden. But we think it is rather to be regarded as a police regulation, requiring a duty to be performed, highly salutary and advantageous to the citizens of a populous and closely,

built city, and which is imposed upon them because they are so situated as that they can most promptly and conveniently perform it; and it is laid, not upon a few, but upon a numerous class, all those who are so situated, and equally upon all who are within the description composing the class. . . . Although the sidewalk is part of the public street, and the public have an easement in it, yet the adjacent occupant often is the owner of the fee, and generally has some peculiar interest in it, and benefit from it, distinct from that which he enjoys in common with the rest of the community. He has this interest and benefit, often in accommodating his cellar door and steps, a passage for fuel, and the passage to and from his own house to the street. . . . For his own accommodation, he would have an interest in clearing the snow from his own door. The owners and occupiers of house-lots and other real estate, therefore, have an interest in the performance of this duty, peculiar and somewhat distinct from that of the rest of the community. Besides, from their situation, they have the power and ability to perform this duty, with the promptness which the benefit of the community requires, and the duty is divided, distributed, and apportioned upon so large a number, that it can be done promptly and effectually, and without imposing a very severe burden upon any one": *Goddard, Petitioner*, 16 Pick. 504, 509, 510; 28 Am. Dec. 259.

In a recent case, this court, referring to the police power, said: "That power is very broad and comprehensive, and is exercised to promote the health, comfort, safety, and welfare of society. . . . Under it the conduct of an individual and the use of property may be regulated so as to interfere, to some extent, with the freedom of the one and the enjoyment of the other: *In re Jacobs*, 98 N. Y. 98, 108; 50 Am. Rep. 636.

And in another late case the court declared that "all property is held subject to the general police power of the state, to so regulate and control its use in a proper case as to secure the general safety and the public welfare": *People v. Gillson*, 109 N. Y. 389, 398; 4 Am. St. Rep. 465.

In both of the cases last referred to, the police power was distinctly recognized, but it was held that a statute to be sustained as an exercise of that power must have some relation to the public health, comfort, or safety, and that the rights of property could not be invaded under the guise of a police regulation for the protection of health, when it was manifest that such was not the object of the regulation.

The following authorities, some expressly and others in principle, justify the passage of the ordinance in question as a proper exercise of police power lawfully delegated to a municipal corporation by the legislature: *People v. Mattimore*, 45 Hun, 448; *Mayor etc. v. Williams*, 15 N. Y. 502, 505; *Phelps v. Racey*, 60 N. Y. 10; 19 Am. Rep. 140; *Cronin v. People*, 82 N. Y. 318; 37 Am. Rep. 564; *Moore v. Gadsden*, 93 N. Y. 12, 17; *Dixon v. Brooklyn C. & N. R. R. Co.*, 100 N. Y. 176, 179; *People v. Aronsberg*, 105 N. Y. 123; 59 Am. Rep. 483; *Vanderbilt v. Adams*, 7 Cow. 349; *Coates v. Mayor etc.*, 7 Cow. 585, 606; *Stokes v. New York*, 14 Wend. 88; *Sharpless v. Mayor etc.*, 21 Pa. St. 147; 59 Am. Dec. 759; *Boston Beer Co. v. Massachusetts*, 97 U. S. 25, 33.

If this power of local legislation can be conferred upon the largest city in the state, it can also be conferred upon the smallest village that the legislature sees fit to incorporate. In this latitude, the accumulation of snow upon sidewalks in large quantities is a matter of course. Its presence retards travel, interrupts business, and interferes with the safety and convenience of all classes. It is a frequent cause of accidents, and thus affects the property of every person who is liable to assessment to pay the damages caused by a failure to remove it. But how is it possible for the authorities of a large city, with many hundred miles of streets, to remove the snow in time to prevent injury to those who have the right to travel upon the sidewalks, unless they can require the owners and occupants of adjacent property to remove it? Every man can conveniently and promptly attend to that which is in front of his own door, and it is both reasonable and necessary that he should be compelled to do so. We think that the ordinance under consideration is valid; that it conflicts with no provision of the constitution, and that it is the duty of the courts to enforce it.

In reaching this conclusion, we have not overlooked the case of *Gridley v. City of Bloomington*, 88 Ill. 554, but have given it the attention to which it is entitled by the high standing of the court that decided it. The argument upon which the opinion in that case rests is, that as the fee of the street was in the corporation, and the sidewalk was a part of the street, the lot-owner had no more interest in the sidewalk in front of his premises than any other citizen of the municipality, because it was set apart for the exclusive use of persons

traveling on foot, and was as much under the control of the municipal government as the street itself.

We are unable to yield to this reasoning, because it overlooks, not only the public safety and general convenience, but also the peculiar interest that every owner or occupant of real property has in a clean sidewalk in front of his own premises. Whatever adds to the usefulness of a sidewalk adds both to the rental and permanent value of the adjacent lot.

After carefully examining all of the questions presented by counsel, we think the judgment should be affirmed.

MUNICIPAL CORPORATIONS, POWERS OF. — A municipality can exercise such powers as are expressly granted it, and such incidental powers as are necessary to carry into effect those specifically granted: *Huesing v. Rock Island*, 128 Ill. 465; 15 Am. St. Rep. 129, and note 137, 138.

MUNICIPALITIES. — ORDINANCES FOR REMOVAL OF ICE AND SNOW: See note to *Port Huron v. Jenkinson*, 18 Am. St. Rep. 413, 414, where the principal case is cited, and the rule as laid down in that case criticised; see also *Goddard, Petitioner*, 16 Pick. 504; 28 Am. Dec. 259.

BREWSTER v. HATCH.

[122 NEW YORK, 349.]

CORPORATION, PROMOTERS OF. — Where a prospectus and subscription agreement state that a corporation is to be formed to purchase mines, that the mines are to be capitalized at one million five hundred thousand dollars, to be divided into shares of the par value of ten dollars each, to be issued to one of the promoters in payment of the mine; that a portion only of the shares is to be offered for sale at four dollars per share, and that the stock is to be fully paid up and non-assessable, and the promoters subsequently purchased the mine, paying therefor out of the moneys paid by other subscribers, and issued to themselves the balance of the capital stock without paying any consideration therefor, they are liable to an action brought by the other subscribers to recover the damages sustained by them from the issue of said stock, it being conceded that the promoters did not disclose the price that they were to pay for the mine, nor the fact they did not intend to purchase unless sufficient funds were furnished by others to pay therefor and for the expense of the corporation, leaving a large amount of stock to be gratuitously distributed among themselves.

ACTION to recover the value of shares of stock distributed among the defendants without cost to them. At the trial, the plaintiffs, being required to elect whether they would recover for the benefit of the corporation or only for their personal damages, elected to recover the latter only. In January, 1879, Martin B. Hayes held options for the purchase of several mines

situate in the state of Colorado, which options expired on the 31st of the same month. On the day preceding that on which the options were to expire, the defendants and one Hubbard H. Duncklee acquired an interest in the options, and paid five thousand dollars to have them extended for four months, and they entered into an agreement in the words and figures following: —

“This agreement, made and entered into this thirtieth day of January, 1879, between Walter T. Hatch, J. Warren Brown, C. E. Quincey, Emory Thayer, and H. H. Duncklee, all of the city and state of New York, and Stephen B. Elkins, of Santa Fé, New Mexico.

“Whereas, the owners of the Dunderberg and Subtreasury mines, situated in the county of Clear Creek, state of Colorado, are willing to sell the same for the sum of one hundred and thirty-five thousand (\$135,000) dollars, and are further willing for the sum of five thousand (\$5,000) dollars, to be paid in cash as a forfeit, to deposit their deed to said mines in escrow in the City National Bank of Denver, with orders to said bank on the payment of said purchase price at any time within four months from the date hereof to deliver said deeds to the purchaser, —

“Now, this agreement witnesseth that the parties hereto have mutually agreed to and with each other as follows: —

“*First.* The interest of the parties in this agreement shall be as follows: The said H. H. Duncklee shall be entitled to one tenth (1-10), and the remaining parties hereto to nine tenths (9-10), in equal proportions; that is to say, the said H. H. Duncklee shall be entitled to five fiftieths (5-50), and the remaining parties hereto to nine fiftieths (9-50) each, and in this proportion the parties hereto, respectively, shall share in all the expenses, losses, and profits arising under this agreement.

“*Second.* They will pay said five thousand (\$5,000) dollars forfeit to the owners of said mines for the privilege of purchasing the same within four months at the price named.

“*Third.* That as soon as the parties hereto shall be reasonably satisfied that said mines are valuable and as they have been represented, they will issue a prospectus, reciting the history of said mines, their character, richness, quantity, and quality of ore, together with a schedule of sales and price of ore heretofore produced, with such other information and such reports as they may deem proper.

Fourth. Upon being satisfied that they can obtain subscriptions sufficient to purchase said mines, and enough, if the parties should so determine, to cancel the existing leases thereon, they will then incorporate and organize a company, under the laws of the state of New York, to be called the Dunderberg Mining Company, with a capital on one million (\$1,000,000) dollars, to be divided into one hundred thousand shares at ten (\$10) dollars per share, the same to be fully paid up and non-assessable. The object of said company will be to purchase, hold, work, and operate gold, silver, lead, copper, and other mines in the state of Colorado or elsewhere. That of the capital stock of said company there shall be given to Martin B. Hayes, of Denver, Colorado, six thousand (6,000) shares upon the conditions hereinafter stated, and of the remaining ninety-four thousand (94,000) shares there shall be sold, at such price per share as the parties hereto may agree upon, a sufficient number to purchase said mines. And if the parties should determine and agree thereupon, an additional number sufficient to cancel the existing leases thereon. And the remaining shares, whatever the number may be, shall be divided between the parties hereto, and held without cost to them, according to their respective interests in this agreement as defined in section 1 thereof, unless they should determine to sell for their joint benefit a portion of said remaining shares. That the six thousand (6,000) shares of the capital stock to given to said Hayes shall be as compensation for his aiding the parties hereto in securing the option on said mines for four months, and that he will co-operate with them and use his best efforts to aid them in soliciting subscriptions to the stock at the price fixed by the parties hereto, and promote the success of the company to be organized, and that he will not sell or dispose of his stock at a price lower than the subscription price of said stock, and the said six thousand (6,000) shares shall be issued only upon said Hayes, binding himself by a suitable agreement in writing to perform these conditions.

Fifth. In the event the parties hereto should fail, within the four months named, to sell shares sufficient to pay for said mines and the existing leases thereon, if they should determine to cancel the same, then and in that event they agree and bind themselves to each to pay his share of all the expenses incurred, and this agreement shall thereafter cease and determine.

Sixth. It is further agreed that the parties shall incur no

expense not actually necessary, and then not without the consent of all the parties hereto.

"*Seventh.* That for the purpose of taking the deeds in escrow and doing all matters necessary to be done in the matter of procuring the same and transacting the business at the mines and in Colorado, the said J. Warren Brown shall act as the trustee of the parties hereto, and when required will make the deeds to the company to be organized as aforesaid when his trust shall cease and determine.

"*Eighth.* That for the purpose of receiving subscriptions for stock, giving receipts, and transacting all financial business of the parties in the premises, they shall select from their number a trustee, who shall act for them.

"*Ninth.* That the parties hereto may change or alter this agreement at their pleasure, all agreeing and consenting to such change or alteration.

"Witness our hands and seals this the first day of February, A. D. 1879.

[Signed]

"J. WARREN BROWN. [Seal.]

"WALTER T. HATCH. [Seal.]

"C. E. QUINCEY. [Seal.]

"EMORY THAYER. [Seal.]

"H. H. DUNCKLEE. [Seal.]

"S. B. ELKINS." [Seal.]

After examination, the title to the mines proposed to be purchased was declared unsatisfactory, and the options were canceled and the sum paid for their extension forfeited. Negotiations were then commenced with rival claimants to the same and other mines, and options for their purchase from them secured. The defendants then agreed that the preceding contract, dated February 1st, should be modified by making the capital of the corporation consist of one hundred and fifty thousand shares at ten dollars each, and excluding Martin B. Hayes from all interest in the venture. In all other respects, the contract should continue binding upon and be applicable to the new options. They, however, agreed that J. Warren Brown should acquire title to the property and convey it to a corporation to be formed, and receive its capital stock in payment; that a part of the shares to be so issued to Brown should be offered for four dollars per share, to reimburse them for their expense in acquiring the property. To accomplish their purpose they issued a prospectus, and levied a subscription as follows:—

"PROSPECTUS OF THE DUNDERBERG MINING COMPANY.

"The property to be conveyed to the Dunderberg Mining Company, when fully organized, consists of the following lode claims:—

Dunderberg Lode	3,000 feet.
East Terrible Lode.....	500 feet.
Subtreasury Lode.....	1,500 feet.
Silver Chain Lode	1,500 feet.
Muldoon Lode	700 feet.
Elephant Lode	700 feet.

"All situate near Georgetown, Clear Creek County, Colorado.

"The Dunderberg Mining Company is now being organized under the laws of the state of New York, with a capital stock of one million five hundred thousand dollars, divided into one hundred and fifty thousand shares of ten dollars each, only a portion of which is offered for sale, at four dollars per share.

"The product on three hundred feet of the Dunderberg mine alone, the past year, was over three hundred thousand dollars, which is more than one and a half per cent a month on the par value of the stock, and about four per cent a month on the investment. There can be no doubt that this yield will be continued, and even greatly increased as the workings are extended. Competent experts estimate the mineral in the new unworked ground already developed at over one million five hundred thousand dollars, which is not one tenth part of the ground undeveloped above water line within the present workings.

"Among the officers and trustees who will manage its affairs, and who will receive subscriptions for stock, may be mentioned,—

"Walter T. Hatch, of W. T. Hatch and Sons, 84 Wall Street.

"J. Warren Brown, 62 Broadway.

"S. B. Elkins, Hotel Bristol, Forty-second Street and Fifth Avenue.

"Charles E. Quincey, of Heath & Co., 19 Broad Street.

"Emory Thayer, 547 Broadway.

"H. H. Dunklee, 62 Broadway.

"The stock is to be fully paid and non-assessable. No money is needed for development, as the mines are open and producing sufficient ore to insure regular dividends on the stock.

"It is proposed by the management to work these properties upon an economical basis, and to create out of the earnings, beyond regular monthly dividends, a surplus to be invested in United States bonds. The principal office will be in the city of New York, where all reports, and maps showing the works, and books will be open to the examination and inspection of the stockholders.

"The Dunderberg and Terrible veins are among the best-known and most popular mines in Colorado; the universal report being that they are well defined, constant, and permanent fissure veins.

"The reports from experts of high character, the actual sales of ores since the mines have been opened, and their known reputation enable the owners to confidently commend the investment to the public as safe, remunerative, and permanent.

"Plan of organization, maps of the property, specimens of ore from the various workings, and authenticated statements of ores sold up to March 1, 1879, and full and detailed reports by the mining engineers and experts who were employed to examine the properties prior to the purchase, may be seen at the office of J. Warren Brown, 62 Broadway.

"The following reports made after personal examination by their authors, who are known both in this country and Europe as among the most reliable and competent authorities upon mining matters, are respectfully submitted."

Favorable letters and reports were annexed to the prospectus, and the following:—

"SUBSCRIPTION AGREEMENT.

"Whereas, a corporation is about to be organized under the laws of the state of New York, to be called the Dunderberg Mining Company, for the purpose, among other things, of acquiring title to the following mining properties, known as the Dunderberg, Subtreasury, Silver Chain, Muldoon, and Elephant mines or lodes, and a part of the Terrible mine or lode, all situate in Clear Creek County, state of Colorado;

"And whereas, the capital stock of said company is to be divided into 150,000 shares, of the par value of ten dollars per share, and all of said stock to be issued to J. Warren Brown in payment for said mines, —

"Now, in consideration of the transfer to us of the several numbers of shares set opposite our names respectively hereunto

subscribed, we do covenant and agree with the said J. Warren Brown that we will accept and receive such stock and pay for the same at the rate of four dollars per share. And for the purpose of carrying out this agreement, we hereby agree to pay to Walter T. Hatch, of 84 Wall Street, New York, as trustee for us, on demand, the aforesaid sums of money so subscribed by us, to be held by the said trustee for us, and paid over by him to the said J. Warren Brown upon the delivery to the Dunderberg Mining Company of a deed or deeds for the mines and mining properties above named, and the receipt from said J. Warren Brown of the several numbers of the shares of stock subscribed by us respectively, and not otherwise.

"Dated New York City, March 10, 1879."

Before forming the corporation, Brown and his associates sold sixty thousand shares, part of which were purchased by plaintiffs at four dollars per share. After procuring the subscription of plaintiffs and others and receiving payment for the stock subscribed at four dollars per share, Brown and his associates incorporated the Dunderberg Mining Company. Payment was made for the mining property out of the money paid by plaintiffs and others upon their subscriptions, and 58,285 shares of the capital stock remained upon hand, which the defendants issued to and divided among themselves, without making any payment therefor. The trial court decided in favor of the defendants, and its judgment was affirmed by the general term.

William B. Hornblower, for the appellants.

William G. Choate, for the respondents.

FOLLETT, C. J. The end which Brown and his associates sought to and did accomplish, as stated in their testimony, and as found by the court, was the acquisition of the mining property by the corporation to be organized, wholly at the cost of such persons as should subscribe and pay for shares to be issued at the rate fixed, and to retain for themselves a majority of the stock without expense or risk. They testified and the court found that their testimony was not disclosed to the plaintiffs. The question is, Was the relation between these litigants simply that of vendors and vendees of shares to be issued? or was it one of trust and confidence, binding the defendants to the exercise of good faith and to disclose such information as they possessed affecting the value of the prop-

erty in which the plaintiffs were induced to purchase an interest? The learned counsel for the respective parties substantially agree on the rule of law governing the rights of the parties. They agree that if the plaintiffs were simply the vendees of the defendants, that the action cannot be maintained; but if the defendants stood in a fiduciary relation to the plaintiffs, a liability exists. The true relation existing between these parties must be sought for in the contracts found by the court to have been entered into, in the prospectus which the defendants put forth, and in the circumstances involved in the transaction. When the plaintiffs subscribed for their shares there was no corporation in existence. Brown had acquired for himself and his associates the right to purchase the mining properties within a given time at prices agreed upon. These options ran to Brown, but he was acting in the interests of his associates, and the legal relation of the defendants is not different from what it would have been had the contracts stood in their own names. Brown and his associates were under no obligation to purchase and pay for the mines, and their loss, if they did not, would be measured by the amount paid for the options and such expenses as might be incurred. This being the situation, the defendants fixed the terms and conditions upon which the corporation should be organized. They devised and put forth the subscription-paper and prospectus, stating in the paper last mentioned that "among the officers and trustees who will manage its affairs, and who will receive subscriptions for stock, may be mentioned Walter T. Hatch, of W. T. Hatch & Sons, 34 Wall Street; J. Warren Brown, 62 Broadway; S. B. Elkins, Hotel Bristol, Forty-second Street and Fifth Avenue; Charles E. Quincey, of Heath & Co., 19 Broad Street; Emory Thayer, 547 Broadway; H. H. Dunclee, 62 Broadway." It is recited in the prospectus and in the subscription-paper that the corporation was thereafter to be organized for the purpose of acquiring title to mines, which were specified. The plaintiffs did not subscribe for shares then in existence, but for shares to be thereafter created by the defendants, and it is certain that it must have been understood by the plaintiffs and those similarly situated that the defendants were to carry forward the enterprise, acquire the property, organize the corporation, and to generally protect the interests of those who should join in furnishing the money to pay for the property. The documents clearly indicate that the defendants, as trustees, were to control and direct

such proceedings as should be taken anterior to the formation of the corporation, as well as after. The prospectus so states, and they actually performed or directed everything that was done preliminarily to the organization, when these defendants, and they only, executed the certificate by which the corporation was brought into existence, making themselves trustees for the first year. In the subscription-paper Mr. Hatch is called the trustee of the subscribers, and so he was, but he was one of the promoters, jointly interested with them, and all are as responsible for his acts as though all had been named as trustees for the subscribers.

As against these facts, it is urged that it being stated in the subscription that the mines were to be capitalized at one million five hundred thousand dollars, to be divided into shares of the par value of ten dollars each, to be issued to Brown in payment for the mines, and in the prospectus that only a portion of the shares are offered for sale at four dollars per share, and that the stock is to be fully paid up and non-assessable, was a distinct notice to the plaintiffs of how the corporation was to be set on foot, and that they and the defendants were dealing solely as vendors and vendees. These papers, read in the light of the purpose of the defendants, as disclosed by their evidence, seem to have been devised to cover the underlying scheme by which the corporation was to be organized, largely for the benefit of the promoters, but wholly at the risk and expense of the subscribers. We do not think that the inference contended for by the defendants can be justly drawn from the meager disclosures which they made in the documents put forth. They knew that they, and they only, absolutely controlled the scheme, and were to determine whether it should be carried out, and if so, when and how. We think that the plaintiffs were led to believe, and had the right to believe, from the documents and from the circumstances, that the defendants were acting in the interests of all of the investors, and that they knew that the plaintiffs so believed. These defendants were the promoters of the corporation, and occupied before its organization a position of trust and confidence towards those whom they induced to invest in the enterprise: *Getty v. Devlin*, 54 N. Y. 403; 70 N. Y. 504; *Erlanger v. N. S. P. Co.*, L. R. 3 App. Cas. 1218; *Simons v. Vulcan O. Co.*, 61 Pa. St. 202; 100 Am. Dec. 628; *Twyecross v. Grant*, L. R. 2 Com. P. Div. 503; *W. B. C. P. Co. v. Green*, L. R. 5 Q. B. Div. 109; Morawetz on Corporations, sec. 545;

Cook on Stock and Stockholders, sec. 651; Thompson on Liabilities of Owners and Agents, p. 218, sec. 20. It is conceded and found by the court that the defendants did not disclose the amount which they were to pay for the mines, or the fact that they did not intend to exercise their options, unless sufficient funds were furnished by others to pay for the property and all of the expenses of organizing the corporation, leaving for distribution among themselves a majority of the stock. It is clear, we think, that if the defendants had avowed their purpose, the plaintiffs would not have taken an interest in the enterprise, and that they are liable for the damages sustained by the plaintiffs, who were induced to invest in shares to be issued.

The judgment should be reversed, and a new trial granted, with costs to abide the event.

CORPORATIONS, PROMOTERS OF. — As to the law relative to promoters of corporations, and their duties and liabilities to the subscribers of the stock, see *Pittsburg etc. Co. v. Spooner*, 74 Wis. 307; 17 Am. St. Rep. 149, and especially elaborate note 161-163.

BOWERY NATIONAL BANK v. WILSON.

[122 NEW YORK, 473.]

ASSIGNMENT VOID AS AGAINST PUBLIC POLICY. — AN ASSIGNMENT BY A SHERIFF OF SUCH FEES as he may become entitled to receive from the state or county for public services thereafter to be rendered is invalid, because against public policy.

Henry D. Hotchkiss, for the appellants.

James S. Marvin, for the respondent.

FOLLETT, C. J. The finding that an oral assignment of the claim was made by Davidson to the bank on the 22d of January, 1886, is challenged by the appellants on the ground that there is no evidence tending to sustain it. The defendants requested the court to find the converse of this proposition, excepted to the finding made, and present a case which contains all of the evidence, and so are in a situation to require a review of the finding. After an examination of all of the evidence, we are convinced that no assignment except the written one was ever made of this claim, and that the most that occurred in January was the recognition of the existence of the previous assignment. No words are found in the evidence

which indicate an intent on the part of Davidson to make a present assignment of his claim to the plaintiff, and had there not been a previous written one, we think no one would assert that any words used in January amounted to a transfer of the claim. This brings us to the consideration of the question whether an assignment by a sheriff of such fees as he may become entitled to receive from the state or county for public services thereafter to be rendered is valid. It is settled in this state that an assignment by a public officer of his unearned salary is contrary to public policy and void: *Bliss v. Lawrence*, 58 N. Y. 442; 17 Am. Rep. 273; *Billings v. O'Brien*, 4 Daly, 556; 45 How. Pr. 392; 14 Abb. Pr., N. S., 238. The same rule is established in England and in some of the United States: *Hill v. Paul*, 8 Clark & F. 295; *Cooper v. Reilly*, 2 Sim. 560; *Wells v. Foster*, 8 Mees. & W. 149; *Beal v. McVicker*, 8 Mo. App. 202; *Bangs v. Dunn*, 66 Cal. 72; *Pomeroy's Eq. Jur.*, sec. 1276; *Story's Eq. Jur.*, 13th ed., sec. 1040 d; *Greenhood on Public Policy*, rule 297.

In *Bliss v. Lawrence*, 58 N. Y. 442, 17 Am. Rep. 273, it was said: "Salaries are, by law, payable after work is performed, and not before, and while this remains the law, it must be presumed to be a wise regulation, and necessary, in the view of the law-makers, to the efficiency of the public service. The contrary rule would permit the public service to be undermined by the assignment to strangers of all the funds appropriated to salaries. . . . If such assignments are allowed, then the assignees, by notice to the government, would, on ordinary principles, be entitled to receive pay directly, and to take the place of their assignors in respect to the emoluments, leaving the duties as a barren charge to be borne by the assignors. It does not need much reflection or observation to understand that such a condition of things could not fail to produce results disastrous to the efficiency of the public service." The reasons here given for holding the unearned salaries of public officers to be unassignable apply with greater force to fees payable upon the due performance of public duties which cannot be discharged by any other officer. If a sheriff can legally assign the fees which may become due him for services to be performed for the public in any given month, he may make a valid assignment of all of the fees that shall become due him for services during the whole of his term. If he could assign to one, he could to many, and every purchaser would be entitled to the rights of assignees of claims against individuals, and in

the case of conflicting interests or of disputes between the officer and his alleged transferee, the government would have to decide at its peril between them, or be subjected, as in the case at bar, to a litigation. By a division of the unaudited claims of a public officer among many persons, a powerful influence in their support may be brought to bear upon the auditing officers, which would not exist if the demands were held by the officer who rendered the service. The statutes provide for the payment of public servants after the rendition of their services, and make no distinction in this respect between officers compensated by a salary or by fees. An officer having assigned his interest in a compensation to become due him for future public services would have less interest in the punctual and efficient performance of his duties, and in the case of improvident assignments, might be without the ability to discharge them.

So great were the evils arising from assignments of claims against the United States that a statute was passed in 1853, and re-enacted in section 3477 of the Revised Statutes of the United States, prohibiting the assignment of any claim or any interest in any claim against the government until after it had been allowed and a warrant for its payment issued. In this state, the right of a public officer to assign unearned fees does not seem to have been considered in any reported case except in *People v. Dayton*, 50 How. Pr. 143, in which it was held at special term that the earned and unearned fees of a justice of the peace might be assigned, but we think this judgment is not supported by the principle declared in the authorities cited. In England and in some of the states, the assignability of unearned fees has been considered, and so far as our attention has been called to the adjudications, no distinction has been made between unearned fees and unearned salaries.

In *Palmer v. Bates*, 2 Brod. & B. 673, a clerk of the peace attempted to assign his unearned fees, but the transaction was held contrary to public policy and void.

In *Hill v. Paul*, 8 Clark & F. 295, the question arose whether an assignment by a keeper of the register of sasines — instruments proving the transfer of feudal property in Scotland — was broad enough to cover future fees; and if it was, were they assignable? The case was finally decided on the first ground, but the assignability of unearned fees was considered and said to be contrary to the public policy of England and Scotland.

In *Field v. Chipley*, 79 Ky. 260, 42 Am. Rep. 215, it was held

that an assignment by the clerk of the court of chancery of the future fees of his office was void as against public policy. Upon principle and authority, we think that an assignment by a sheriff of fees for services to be rendered to the public is contrary to public policy and is void.

The judgment should be reversed, and a new trial granted, with costs to abide the event.

ASSIGNMENT — SALARY OR EARNINGS OF PUBLIC OFFICER. — The assignment by a public officer of his salary not yet due, or of his future earnings, is void as against public policy: Note to *Skipper v. Stokes*, 94 Am. Dec. 650; note to *Brackett v. Blake*, 41 Am. Dec. 442. The unearned pay of a retired officer of the army is not subject to assignment: *Schwank v. Wyckoff*, 46 N. J. Eq. 560, *ante*, p. 438.

BATTERMAN v. ALBRIGHT.

[122 NEW YORK, 484.]

FORECLOSURE SALE, EFFECT OF, BY RELATION. — Upon a foreclosure sale, the purchaser takes the title of the mortgagor as of the time when the mortgage lien was created.

MORTGAGE SALE. — WHERE NURSERY-TREES ARE GROWN UPON MORTGAGED PREMISES, a sale and conveyance made under the foreclosure of the mortgage pass to the purchaser the title to such trees, as against a person claiming under an execution sale against the mortgagor under a levy which is subsequent to the lien of the mortgage.

FORECLOSURE OF A MORTGAGE IS NOT SUBJECT TO COLLATERAL ATTACK because an assignee of part of the mortgage debt was not a party thereto.

FORECLOSURE OF MORTGAGE, PARTIAL TO. — One who has purchased nursery-trees under an execution against a mortgagor appears not to be a necessary party to the foreclosure of a mortgage previously made upon the lands upon which the trees grew; and upon the making of a conveyance to the purchaser under the sale pursuant to such foreclosure, his title to such trees as remain on the premises is paramount to that of the purchaser at the execution sale.

ACTION for the conversion of nursery-trees, the title to which the plaintiff claims to have acquired under a purchase thereof in October, 1877, at a sale under execution against Peter S. Markle. The title to the land upon which the trees grew was in Peter Markle, subject to a mortgage made by him to one Albright in November, 1868. This mortgage to Albright having been foreclosed, a sale thereunder was made to the mortgagor in October, 1878, and he conveyed to the defendant in 1879, after a deed in pursuance to the mortgage sale had first been executed. The defendant went into possession April 1, 1879, and refused to permit the plaintiff to take away certain

nursery trees and shrubs which remained on the premises, and to which the plaintiff claimed to have acquired title under the execution sale. The judgment of the trial court, in favor of the defendant, was affirmed by the general term.

W. Frothingham, for the appellant.

Charles J. Buchanan, for the respondent.

BRADLEY, J. It may be assumed that as against Markle, the judgment debtor, the plaintiff, by his purchase at the sale made by the constable upon the execution, took title to the nursery-trees, and the right to remove them. The question for consideration has relation to the effect, upon such rights, of the foreclosure of the mortgage, and the title to the premises derived from it. The trees and bushes in question had been grown in the nursery since the mortgage was made, and the plaintiff's claim of title was derived wholly from his purchase on the execution sale. As against the mortgagor, the foreclosure and sale were effectual to vest the title to the trees in the purchaser, and in the defendant as his grantee. The rule, as between mortgagor and mortgagee, as to crops growing on mortgaged premises, is no less favorable to the claim of the plaintiff than that relating to nursery-trees, which partake of the same character. And the principle applicable to both, in such case, may be treated as the same. The doctrine on the subject of emblements, and who, in their relation to the land on which they were growing, were entitled to them, was well defined at common law, and it was distinct from that of fixtures. They were treated as so distinct from the real estate as to be subject to many of the incidents of personal chattels: Co. Lit. 55 b; 2 Bla. Com. 404. And although they did not go to the heir, they did to the devisee, and to the remainderman for life: Broom's Legal Maxims, 305. And in this state they go to the devisee, subject only to the payment of debts of the testator and the legacies given by his will: *Bradner v. Faulkner*, 34 N. Y. 347; *Stall v. Wilbur*, 77 N. Y. 158. They, belonging to the grantor, also passed with a conveyance of the land, and such is now the rule. And the common law, in respect to emblements, is not very greatly modified by the statute, which provides that they be deemed assets, and shall go to executors and administrators, to be applied and distributed as personal estate: 2 R. S., sec. 6, p. 82. It may be observed that the doctrine applicable to growing crops is distinguishable from that relating to other personal property

on land, as between grantor and grantee and mortgagor and mortgagee. The theory on which it rests is, that they in some sense appertain to the realty. And the general rule, as declared from an early day by text and judicial writers, is, that a party entering into possession by title paramount to the right of the tenant takes them: Co. Lit. 55 b; *Davis v. Eyton*, 7 Bing. 154. Whether, without the aid of some statute, that rule is subject to any qualifications or exceptions, and if so, what, it is now unnecessary to inquire or determine. In the present case, the mortgagor had been in default several years at the time of the plaintiff's purchase of the nursery-trees on the execution sale. And the defendant's entry into possession of the premises was by title paramount to any right which could have been derived from the mortgagor in them subsequently to the time the mortgage was given. Although since the right to maintain ejectment is denied to a mortgagee by statute (2 R. S., sec. 57, p. 312; Code, sec. 1498), his mortgage is a mere security, and the title to the mortgaged premises remains in the mortgagor, the foreclosure and sale in practical effect operates to eliminate the defeasance, and the purchaser takes the title of the mortgagor as of the time the mortgage lien was created: *Rector etc. v. Mack*, 93 N. Y. 488. And while the plaintiff, as against the mortgagor, and without liability to the mortgagee, may have taken the nursery-trees from the premises prior to the time of the foreclosure of the mortgage, he had no such right as against the purchaser or his grantee, who had entered under the title perfected by the sale on foreclosure, and the conveyance made pursuant to it: *Lane v. King*, 8 Wend. 584; 24 Am. Dec. 105; *Shepard v. Philbrick*, 2 Denio, 174; *Gillett v. Balcom*, 6 Barb. 370; *Jewett v. Keenholts*, 16 Barb. 194; *Sherman v. Willett*, 42 N. Y. 146; *Aldrich v. Reynolds*, 1 Barb. Ch. 613; *Adams v. Beadle*, 47 Iowa, 439; 29 Am. Rep. 487.

The suggestion of the plaintiff's counsel that there has been a modification of the rule of law on the subject, and that the case of *Lane v. King*, 8 Wend. 584, 24 Am. Dec. 105, is not therefore entitled to the weight of authority, may be applicable to fixtures to which the authorities cited by him relate. But emblements are not fixtures within the meaning of the rule applied to them. The subject of the former is treated in the law as distinct from the latter; and while they may be taken on execution supported by a judgment not a lien upon the realty, those things which have become fixtures cannot. But

the doctrine peculiar to growing crops, originating in considerations deemed beneficial to the interests of agriculture, has remained substantially unchanged, and the rule, as stated in *Lane v. King*, 8 Wend. 584, 24 Am. Dec. 105, was not only followed in some of the cases before cited, but that case and its doctrine have more recently been judicially cited and referred to with approval in this state: *Harris v. Frink*, 49 N. Y. 81; 10 Am. Rep. 318; *Samson v. Rose*, 65 N. Y. 416; and it quite uniformly prevails where the common law on the subject remains in force. The rigor of the old common law, which gave forfeiture as the consequence of default in payment of a mortgage, has been modified so as to permit payment at any time before sale on foreclosure. But that does not affect the question under consideration. And our attention is called to no reason why the considerations upon which the doctrine relating to emblements was founded and has since been observed, are now any less entitled to sanction than formerly. The fact that the right to ejectment is taken away from the mortgagee by the statute, and the mortgage reduced to a mere chose in action secured by lien upon the land, while the defeasance remains effectual, does not seem to have any essential bearing upon the question, inasmuch as the perfecting of title under it has relation to the time it became a lien. The case of *Mott v. Palmer*, 1 N. Y. 564, is not analogously inconsistent with the view here taken. There the right of the plaintiff, under his agreement with the owner of the premises, arose before the sale and conveyance to the defendant. And if the right of the plaintiff in the present case had been acquired to the trees prior to the mortgage, a different question would have been presented. In that event, the sale upon the execution and purchase by the plaintiff may have, so far as essential, been treated as a severance of the growing trees from the realty. But they cannot be so treated as against the title paramount of the defendant: *Shepard v. Philbrick*, 2 Denio, 174; *Gillett v. Balcom*, 6 Barb. 370. These views lead to the conclusion that the plaintiff was not entitled to recover, if the foreclosure of the mortgage was effectually made. The plaintiff's counsel contends that it was not, because, — 1. One Mary M. Markle was not made a part to the foreclosure action; and 2. The plaintiff was not a party to it. The first objection was founded on the fact that the mortgagee had assigned a partial interest in the mortgage to Mary M. Markle. This did not render the decree invalid. The mortgagee was a proper party

plaintiff, and the omission to unite the other party having a claim upon a portion of the amount secured by the mortgage furnished no ground for a collateral attack by the mortgagor or the plaintiff. The equity of redemption was barred by the foreclosure. And the plaintiff had no relation to the realty to make him a necessary party for any purpose essential to the title derived from the foreclosure of the mortgage. He could acquire no interest in it by his purchase upon his execution sale. Nor is it found that the mortgagee, at the time of the foreclosure sale, had any notice of the claim of the plaintiff founded upon his purchase: Code, sec. 1671.

The judgment should be affirmed.

MORTGAGE, FORECLOSURE OF. — Crops growing upon land that is mortgaged belong to the purchaser thereof under a foreclosure sale: *Note to Cress v. Penilleton*, 19 Am. Dec. 753-755.

MORTGAGE, FORECLOSURE OF. — Foreclosure operates only upon the estate of the mortgagor at the date of the mortgage, and the sale under the decree passes the mortgagor's interest and estate to the purchaser: *San Francisco v. Lawton*, 18 Cal. 465; 79 Am. Dec. 187.

MENTZ v. NEUWITTER.

[122 NEW YORK, 491.]

STATUTE OF FRAUDS. — A MEMORANDUM IS NOT SUFFICIENT TO TAKE A SALE OUT OF THE STATUTE OF FRAUDS, UNLESS it contains substantially the whole agreement and all its material terms and conditions, so that one reading it can understand from it what the agreement is. It must be such that when produced in evidence it will inform the court or jury, without parol evidence, of the essential facts set forth in the pleading, and which go to make a valid contract. These essential facts consist of the subject-matter of the sale, the terms, and the names or descriptions of the parties.

STATUTE OF FRAUDS. — MEMORANDUM OF A SALE OF REAL ESTATE WHICH does not name nor describe the vendor is fatally defective.

ACTION to recover the difference between a bid claimed to have been made by the defendant for real estate at auction and the amount subsequently realized from a resale of the same property, on account of the defendant's refusing to comply with such bid. The plaintiff, being the owner of the premises No. 311 East One Hundred and Fourth Street, in the city of New York, authorized Richard V. Harnett & Co., auctioneers, to make a sale thereof at public auction, and these auctioneers offered the premises at auction sale, and sold the same to defendant for the sum of eleven thousand

eight hundred dollars. The auctioneers then made a memorandum sale in the words and figures following:—

Wed. 28 April '86.

\$11 E 104	Terms Sale	RICHARD V. HARNETT.
11000	7000	
250	at 5 per cent	
250	2 m	
11750	8000	
11800	at 6 per cent	
J. N. Newwitter	can be paid	
4 Pine St.		

The book in which the memorandum was made contained a printed advertisement of the sale, but did not describe or name the owner. There was no other written contract between the parties, and the question determined by the appellate court was, whether the above memorandum was sufficient, under the statute of frauds. The trial court gave judgment for the plaintiff, which was affirmed by the general term of the court of common pleas for the city of New York.

John J. Linsom, for the appellant.

Michael H. Cardoso, for the respondent.

BROWN, J. The exceptions to the referee's finding, that the premises in question were sold by Harnett & Co., the auctioneers, to the defendant, and that said auctioneers thereupon made and signed a memorandum of sale, present the question of the sufficiency of the memorandum recorded in the auctioneers' books.

It is upon that memorandum that the judgment is founded, and it is upon that that the respondent relies as a compliance with the statute of frauds. The statute is as follows: "Every contract . . . for the sale of any lands . . . shall be void, unless the contract, or some note or memorandum thereof, . . . be in writing, and be subscribed by the party by whom the sale is to be made. Every instrument required to be signed by any party under the last preceding section may be subscribed by the agent of such party lawfully authorized."

The writing of the auctioneer's name upon the margin of the book may be regarded as a sufficient subscription of the contract by the vendor in this instance, and for the purpose of disposing of this appeal, we may assume that the instru-

ment created a valid and binding contract if it be such a note, or memorandum thereof, as the statute requires. And the precise question we are to determine is, whether a memorandum which does not name or describe the vendor fulfills the requirements of the law.

A note or memorandum in writing of the contract is necessary to give validity, not only to agreements for the sale of land, but also to agreements not to be performed within a year, to answer for others' debts, and for the sales of goods and chattels and things in action, for the price of fifty dollars or more.

In considering, therefore, the question what is a sufficient "note or memorandum" within the meaning of the statute, cases decided under any of these several provisions of the statute may be examined as authorities.

Many English cases in regard to sales of goods and chattels are collected in Benjamin on Sales, Bennett's ed., sections 234-238, and that learned author states the general rule deduced from them to be as follows: "It is indispensable that the written memorandum should show not only who is the person to be charged, but also who is the party in whose favor he is charged. The name of the party to be charged is required by the statute to be signed, so that there can be no question of the necessity of his name in the writing. But the authorities have equally established that the name, or a sufficient description, of the other party is indispensable, because, without it, no contract is shown, inasmuch as a stipulation or promise by it does not bind him, save to the person to whom the promise is made, and until that person's name is shown, it is impossible to say the writing contains a memorandum of the bargain."

The leading English case on the subject is *Champion v. Plummer*, 1 Bos. & P. N. R. 252, where Champion, by his agent, wrote down in a memorandum-book the terms of a verbal sale to him by the defendant, and defendant signed the writing. The words were, "Bought of W. Plummer," etc., with no name of the person who bought. Sir James Mansfield, C. J., said: "How can that be said to be a contract, or memorandum of a contract, which does not state who are the contracting parties. By the note, it does not appear to whom the goods were sold. It would prove a sale to any other person as well as to the plaintiff."

Among other cases may be cited *Williams v. Lake*, 2 El. &

E. 349; *Williams v. Byrnes*, 9 Jur., N. S., 363; *Potter v. Duffield*, 9 Eng. Rep. 664.

Potter v. Duffield, 9 Eng. Rep. 664, was a case of a sale of real estate at auction. The name of the vendor was not disclosed. The plaintiff's agent signed a memorandum of the contract, and the auctioneer signed for the vendor as follows: "Confirmed on behalf of the vendor. Beadles, per N. J., Aug. 20, 1869."

This was held by the master of the rolls, Sir George Jessel, not a sufficient memorandum under the statute, for the reason that the vendor was neither named or described.

The American cases are to the same effect: *Coddington v. Goddard*, 16 Gray, 436-442; *Sanborn v. Flagler*, 9 Allen, 474-476; *Waterman v. Meigs*, 4 Cush. 497; *Nichols v. Johnson*, 10 Conn. 192; *Sherburne v. Shaw*, 1 N. H. 157; 8 Am. Dec. 47; *Brown v. Whipple*, 58 N. H. 229; *Webster v. Ela*, 5 N. H. 540; *Lincoln v. Erie Preserving Co.*, 132 Mass. 129; *Grafton v. Cummings*, 99 U. S. 100; *Knox v. King*, 36 Ala. 367.

The question was fully examined by the supreme court of the United States in *Grafton v. Cummings*, 99 U. S. 100. That case arose in the state of New Hampshire, where the statute provides that no action can be maintained on a contract for the sale of land unless the agreement is signed by the party to be charged, or by some person by him authorized.

The contract was signed by Grafton, the purchaser, and it was assumed by the court that it was also signed by the auctioneer, and the precise question presented was stated to be whether the contract was void because the vendor was not named in it.

It was held that it was void.

The same doctrine is stated in Brown on the Statute of Frauds, secs. 371-375; Smith on Contracts, 134, 135; 3 Parsons on Contracts, 13, note e.

In this state, Chancellor Kent, in *Bailey v. Ogden*, 3 Johns. 399, 3 Am. Dec. 509, stated the general rule to be that "the form of the memorandum cannot be material, but it must state the contract with reasonable certainty, so that the substance of it can be made to appear and be understood from the writing itself, without having recourse to parol proof."

Again, the same learned judge, in *Clason v. Bailey*, 14 Johns. 484, said: "Forms are not regarded, and the statute is satisfied if the terms of the contract are in writing and the names of the contracting parties appear."

First Baptist Church v. Bigelow, 16 Wend. 28, was a case of a sale of a church pew.

The same rule was again stated, and the memorandum was held insufficient because it stated no parties or terms of payment.

Calkins v. Falk, 39 Barb. 620, was a case of a sale of hops. The written memorandum was held defective, and the rule stated that the terms of the contract and the names of the contracting parties must appear in the instrument. This case was affirmed in this court: 41 N. Y. 610; 1 Abb. App. 291.

The opinion of the court appears in the latter volume, where it is held that the names of the contracting parties must appear in the memorandum required by the statute.

In nearly all the cases in this state *Champion v. Plummer*, 1 Bos. & P. N. R. 252, was cited with approval. And the whole current of authority in this state is, that the memorandum must contain substantially the whole agreement, and all its material terms and conditions, so that one reading it can understand from it what the agreement is: *Wright v. Weeks*, 25 N. Y. 159; *Drake v. Seaman*, 97 N. Y. 230.

No case holding a different rule is cited by the general term, and none by the counsel for the respondent, except *Salmon Falls Mfg. Co. v. Goddard*, 14 How. 446.

There was a strong dissent in that case, and it was said in *Grafton v. Cummings*, 99 U. S. 100, that it was to be doubted whether the opinion of the majority was sound law. It is clearly in conflict with the general current of authority, and may well be disregarded in view of the later decision of the same court.

Tested by the rule established by the adjudged cases, the memorandum in this case was insufficient to answer the requirements of the statute.

It must be such that when it is produced in evidence it will inform the court or jury of the essential facts set forth in the pleading, and which go to make a valid contract.

Such essentials must appear without the aid of parol proof, either from the memorandum itself or from a reference therein to some other writing or thing; and such essentials, to make a complete agreement, must consist of the subject-matter of the sale, the terms, and the names or a description of the parties.

The memorandum in suit failed to state the name of the vendor or to give any description by which he or she could be

identified, and this omission was fatal. In the potent language of the statute, the contract was void.

The judgment should be reversed, and a new trial granted, costs to abide the event.

STATUTE OF FRAUDS—SUFFICIENCY OF MEMORANDUM IN CONTRACT OF SALE.—A written memorandum of a contract for the sale of an interest in lands is not sufficient within the meaning of the statute of frauds, unless it discloses the terms of the contract and the parties thereto: *Sherburne v. Shaw*, 1 N. H. 157; 8 Am. Dec. 47. The memorandum must be signed by the vendor: *Worrall v. Munn*, 5 N. Y. 229; 55 Am. Dec. 330, and particularly note 344, 345. Compare *Lee v. Cherry*, 85 Tenn. 707; 4 Am. St. Rep. 802, and note.

BUNNELL v. STERN.

[122 NEW YORK, 539.]

NEGLIGENCE—STORE-KEEPER AND CUSTOMER.—Where a store-keeper, by his conduct and business, invites persons to come to his store, and to lay aside one garment to try on another, he owes a duty to exercise some care to prevent the garments so laid aside from being stolen or lost, and failing to exercise any care whatever, is answerable for the loss of such garment.

ACTION to recover damages for the loss of a cloak and other articles left in the care of defendant. Judgment of the lower court, in favor of plaintiff, was reversed on appeal to the general term of the court of common pleas for the city and county of New York.

L. B. Bunnell, for the appellant.

Adolph L. Sanger, for the respondents.

VANN, J. The defendants are the proprietors of a retail store on Twenty-third Street, in the city of New York, which has a department for the sale of ready-made cloaks. On the 19th of April, 1887, the plaintiff went to their store to purchase a wrap, and entering the cloak department and making known her business, was conducted by one of the saleswomen to a place where there were two chairs near a mirror. She sat down on one of the chairs while the clerk brought her several garments to examine, and after looking them over for ten or fifteen minutes, she selected one to try on, and went to the mirror for that purpose. A large window was open near by, and she complained of the draught, whereupon the clerk conducted her through a passage-way formed by iron frames, on

which wraps were hung, to another compartment, about twenty-five feet distant, where there was a mirror, but no chairs. The clerk carried the new cloak, and stood in front of the mirror waiting for the plaintiff to put it on. The plaintiff carried her own cloak, which she had removed in order to try on the other, to the place where the clerk stood, and laid it on a counter about eight feet from the mirror, directly in front of another clerk, who stood behind waiting upon a customer. She did not ask, and was not told, where to put her cloak, but the saleswoman who was waiting upon her, as well as the clerk behind the counter, observed her as she thus laid it down, but neither said anything. There was no other place to put the cloak. The plaintiff, after spending four or five minutes in trying on the garment, said that she would take it, and at once went to get her cloak; but it could not be found, although a careful search was made for it. Only one other customer was in either of the compartments while the plaintiff was in the store.

There was a floor-walker in the cloak department, who had the same authority there as one of the defendants. It was his duty to supervise the exhibition of goods by employees; to see that things were in their places; that the clerks attended to their duties; that nothing was taken away without authority; and that customers received proper attention. He saw nothing that transpired on this occasion, as he was in another room, but for what purpose does not appear. Two other floor-walkers were employed on that floor, and there was a detective on duty in the store, but no evidence was given as to their whereabouts when the plaintiff lost her cloak. One of the floor-walkers, when asked what arrangements were made for the protection of cloaks taken off by customers in order to try on others, answered that they "leave their garments on chairs."

The clerk who waited upon the plaintiff testified that customers, under such circumstances, placed their cloaks on chairs and where it was most convenient for them, and that she paid no attention to garments removed in order to try on others.

No notice was given to the plaintiff, either directly or indirectly, as to where she should put her cloak, and no instructions had been given by the defendants to their clerks as to the disposition of garments removed by customers in order to try on those offered for sale. These facts were either expressly

sworn to and not denied, or are permissible inferences which the trial justice, sitting without a jury, is presumed to have drawn from the evidence. The question is thus presented whether the defendants owed any duty to the plaintiff which they omitted to discharge to her injury.

The defendants kept a store, and thus invited the public to come there and trade. In one of its departments they kept ready-made cloaks for sale, and provided mirrors for the use of customers in trying them on, and clerks to aid in the process. They thus invited each lady who came there to buy a cloak to remove the one she had on and try on the one that they wished her to purchase, because the invitation to do a given act extends, by implication, to whatever is known to be necessary in order to do that act. It is not perceived that under the circumstances disclosed by the evidence the obligation of the defendant would have been greater or in any respect different if one of their number had met the plaintiff on the street and had not only expressly invited her to come to the store and buy a cloak, but had also requested her to take off her wrap and try on the one that he offered to sell her. The clerk who waited upon her stood in the place of the defendants as long as she was engaged in the line of her duties, and no claim is made that she at any time exceeded her authority. Therefore, when she led the way to the second mirror, and stood before it holding the new garment in her hands, in readiness to help the plaintiff try it on, in legal effect one of the defendants stood there inviting her to try it on, and to lay aside her wrap for that purpose. She accepted the invitation, and removed her wrap; but as she could not hold it in her hands while she tried on the other, it was necessary for her to lay it down somewhere. No place was provided for that purpose. There was not even a chair in sight. She was neither notified where to put it, nor informed that she must look out for it, as it would be at her own risk whatever she did with it. She put it in the only place that was available, unless she threw it on the floor, and as she did so, in contemplation of law, the defendants stood looking at her.

Under these circumstances we think that it became their duty to exercise some care for the plaintiff's cloak, because she had laid it aside on their invitation and with their knowledge, and without question or notice from them had put it in the only place that she could. The consideration for the implied contract imposing that duty resided in the situation of

the plaintiff and her property for which the defendants were responsible, and in the chance of selling the garment that she had selected. It is unnecessary for us to define the degree of care required by the circumstances, because no care whatever was exercised by the defendants. While they created the situation that required care, they made no provision for it by furnishing a safe place to deposit the property of customers, or notifying the plaintiff to look out for her cloak herself, or making rules for the government of their employees under such circumstances, or in any other way. Even the chairs on which customers were in the habit of leaving their garments were wholly wanting, and the floor-walker was absent without explanation as to the reason. As the defendants were bound to use ordinary care to keep their premises in a safe condition for the access of business visitors, whether expressly or impliedly invited (*Coughtry v. Globe Woolen Co.*, 56 N. Y. 124, 126; 15 Am. Rep. 387; *Beck v. Carter*, 68 N. Y. 283; 23 Am. Dec. 175; *Welch v. McAllister*, 15 Mo. App. 492; *Nave v. Flack*, 90 Ind. 205; 46 Am. Rep. 205; *Pastens v. Adams*, 49 Cal. 87; *Learoyd v. Godfrey*, 138 Mass. 315), so we think they were bound to use some care for the property of the plaintiff, properly brought there, and necessarily laid aside by their implied invitation in order to attend to the business in hand. They omitted to do that which "a reasonable man, guided by those considerations that ordinarily regulate the conduct of human affairs" would have done under the same circumstances, and were thus guilty of negligence.

Our attention has been called to no authority directly in point. The cases relied upon by defendants are *Carpenter v. Taylor*, 1 Hilt. 193; *Rea v. Simmons*, 141 Mass. 561; 55 Am. Rep. 492; *Whitney v. Pullman Palace Car Co.*, 143 Mass. 243.

In *Carpenter v. Taylor*, 1 Hilt. 193, the plaintiff entered the saloon of a hotel to get refreshments between twelve and one o'clock at night, and when he went out the place was being closed. He left his opera-glass behind, but it did not appear where, and the next morning when he called for it, it could not be found. As it did not appear that the defendant or any of his servants ever received or even saw the glass, it was properly held that he was not responsible for its loss.

While *Rea v. Simmons*, 141 Mass. 561, 55 Am. Rep. 492, is somewhat analogous to the case at bar, in its facts, the decision seems to have proceeded on a question of practice. The entire opinion consists of ten lines, and states that while

the case was reported to the court for its opinion upon the question of law involved, no specific questions of law are stated in the report, and none appear to have been raised at the trial. It then states that the decision of the trial court upon the facts is conclusive, and cites two authorities which hold that the facts found below are not open to review.

In *Whitney v. Pullman Palace Car Co.*, 143 Mass. 243, the decision was simply that the plaintiff was guilty of contributory negligence, while the question whether there was any evidence of negligence on the part of the defendant was expressly reserved.

We think that the defendants, as voluntary custodians for profit to themselves, were bound to exercise some care over the plaintiff's cloak, and that on account of their absolute failure in this regard, they were properly held liable by the trial court for the damages that she sustained.

The order of the general term should be reversed, and the judgment of the district court affirmed, with costs.

NEGLECTANCE. — As to the duties and liabilities of owners of premises to persons coming thereon by invitation, express or implied, see note to *Bedell v. Berkey*, 15 Am. St. Rep. 375.

COPPINS *v.* NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY.

[122 NEW YORK, 557.]

NEGLECTANCE OF A FELLOW-SERVANT DOES NOT RELIEVE A MASTER from liability to a co-servant for an injury which would not have happened had the master performed his duty.

MASTER AND SERVANT. — RAILWAY CORPORATION OWES A DUTY TO ITS SERVANTS, SO FAR AS REASONABLE CARE can accomplish it, to employ competent men in the management of its road.

MASTER AND SERVANT. — A SERVANT IS NOT COMPETENT WHEN HE CANNOT BE RELIED UPON to execute the rules of his master, unless prevented by causes beyond his control. Incompetency exists not only in physical or mental attributes, but in the disposition with which the servant performs his duties. If he habitually neglects them, he must be regarded as incompetent, though he is physically and mentally able to do well all that is required of him.

MASTER AND SERVANT. — WHERE A SERVANT IS IN THE HABIT OF NEGLECTING HIS DUTY, and such negligence is known, or by the exercise of reasonable diligence would have been known, to the master, the latter is liable for injuries resulting from such negligence.

MASTER'S LIABILITY FOR INJURY TO SERVANT. — IF A SWITCHMAN HABITUALLY NEGLECTS HIS DUTIES by absenting himself from his post at times when he ought to be there to signal passing trains, and leaves a switch open when he supposed he had closed it, and his mistake would have been discovered in time to prevent an accident had he been at his post when the next train was expected to pass, and he, from his absence, failed to discover such mistake, whereby the train was derailed and a brakeman injured, the latter may recover of the railroad company damages suffered by him from such accident.

ACTION to recover damages claimed to have resulted from defendant's negligence. Plaintiff, being a brakeman in the employ of the defendant, was upon an express train, which, according to its schedule, was to pass a station at three minutes past five in the afternoon on the 10th of May, 1880. The train on which he was employed was derailed by reason of a misplaced switch, and he was seriously injured. There were four tracks at the station where the injury occurred, connected by cross-overs and switches. Martin Schram was an employee of the defendant, whose duty it was to shift and close these switches. On the day of the accident, he left a switch open, neglected to close it, and went away to supper. The engineer of the train on which plaintiff was, not noticing the misplaced switch until within five hundred feet of it, was unable to stop the train in time to prevent the accident. Verdict and judgment were in favor of the plaintiff in the trial court. The general term, on appeal, modified and then affirmed the judgment, and from this judgment of affirmation a further appeal was prosecuted.

William G. Tracy, for the appellant.

Louis Marshall, for the respondent.

BROWN, J. If the evidence in this case justifies the conclusion that the engineer of the passenger train was negligent in not observing the target at the misplaced switch, or in running his train at a high rate of speed past the station, in the absence of signals that the track was safe, that fact of itself is not available as a defense, if negligence was established on the part of the defendant, as the law is too well settled upon principle and authority to be now questioned: that negligence of a servant does not excuse the master from liability to a co-servant for an injury which would not have happened had the master performed his duty: *Cone v. Delaware etc. R. R. Co.*, 81 N. Y. 206; 37 Am. Rep. 491; *Ellis v. New York etc. R. R. Co.*, 95 N. Y. 552; *Stringham v. Stewart*, 100 N. Y. 516.

We come, therefore, to the consideration of the question of defendant's negligence, and this involves an inquiry into the rules that had been adopted by defendant to insure the safe passage of trains through the St. Johnsville yard, and over the switches in question, and whether the violation of these rules in this particular instance can be charged against the defendant as an act of negligence on its part.

The rules required that a train should not cross the passenger tracks within twenty minutes immediately preceding the arrival of a passenger train, and during that time, and until the passenger train has passed, the switches connecting with the tracks on which the train was running were to be closed and locked.

Schram and one Fenton were employed in the yard as switchmen, and at the time of the accident Schram's hours of service were from mid-day to midnight.

It was the duty of these men to open and set the switches for trains crossing the tracks, and to see that they were closed and locked previous to the arrival of trains on the main tracks.

Other men about the yard had keys to the switches, and were accustomed to open and operate them when Schram and Fenton were engaged elsewhere about the yard. We are concerned, however, only with the duties of these men as to passenger trains that did not stop at St. Johnsville, and it is no importance that other duties about the yard may occasionally have called them away from the switches on the arrival of other trains.

As to the trains that did not stop, the evidence of the division superintendent was, that it was the switchman's duty to signal those trains. The safety-signals were a white flag by day and a white light by night, and the danger-signal, a red flag in the daytime and a red light at night.

Obviously, a proper performance of this duty included an investigation into the condition of the track and switch to ascertain the fact which was communicated by the signal to the engineer in charge of the approaching train, and the usual manner of executing the rule was thus testified to by Schram: "I would go down to the switch and see if it was all right, about ten minutes before the arrival of the train, and then return up toward the depot at the highway crossing, and display my signal to the engineer from that locality. I would

look over the switches to see they were all right, so as to give a proper signal; then I would wait until the train came into sight, and show a signal, put out a white flag, or a red one if it was n't right."

Upon the day of the accident, Schram left the yard ten minutes before the train was due, and went to his supper. The examination of the switches was not made by any one, and no flag signal was displayed.

That this was negligence on the part of Schram is not disputed; but it imposed no liability upon the defendant, unless the act can be attributed to it. The plaintiff seeks to so charge it by proof that Schram was in the habit of frequently neglecting to be at his post and signal passenger trains, and was in the habit of frequently leaving the yard and going to his supper about the time the train in question was due at St. Johnsville, and that his habits in that respect were known, or ought with reasonable care and attention to have been known, to defendant.

If the evidence justified this conclusion, the defendant's negligence was established. No distinction exists in principle between permitting the use of defective machinery and permitting employees to habitually disregard the safeguards that have been provided to insure the safe running and operation of trains.

The defendant's duty to the plaintiff, so far as reasonable care would accomplish it, was to employ only competent men in the management of its road. A competent man is a reliable man; one who may be relied upon to execute the rules of the master, unless prevented by causes beyond his own control. Hence incompetency exists not alone in physical or mental attributes, but in the disposition with which a servant performs his duties. If he habitually neglects these duties, he becomes unreliable, and although he may be physically and mentally able to do well all that is required of him, his disposition toward his work and toward the general safety of the work of his employer, and to his fellow-servants, makes him an incompetent man.

We are of the opinion that the evidence in this case justified the inference that Schram was in the habit of leaving his post of duty to go to his meals at times when his presence there was demanded to insure the safe operation of the road. With reference to the train in question, his own evidence showed

that four or five times a month he was absent when the train passed, and at such times no signal was displayed. He testified that he knew he had no right to go away from the yard without signaling the train when it went through, and that it was his business to be there whether the train was late or on time. This disregard of his duties was known to all the employees about the yard, and to the engineer and fireman on the train in question, and it was not an uncommon thing for the train to pass when no signals were displayed.

It was known to Edwards, Schram's immediate superior, but he testified that he never had reported it to the division superintendent, who alone had the power to remove Schram. The evidence, however, was ample to justify the inference that the defendant should have known of it, and with proper diligence could have ascertained it. There was no secrecy about Schram's habits in this respect, and the slightest attention to the condition of affairs about the yard in the morning and evening would have disclosed the fact that he frequently left his post at those hours. And we are of the opinion that there was evidence from which the jury could find that Major Priest, the division superintendent, had actual knowledge of the fact.

It appeared from Schram's testimony that Priest frequently came into the yard when he was at breakfast, and it was not an improper inference therefrom that he should have known of Schram's neglect of his duties.

The request to the court to charge was not in reference to Priest's knowledge of his absence at the hour of the day when the accident happened, but as to his knowledge of the violation of the rule which required his presence in the yard during the hours of service.

The court did charge as to this, that there was no direct evidence that Priest knew of it; but it refused to charge that there was no proof upon which the jury could find it at all. And this refusal, for the reason already stated, was not erroneous. We are of the opinion, therefore, that the evidence justified the conclusion that the defendant was negligent in retaining Schram in its employ after its knowledge of his customary neglect of duty. But the appellant claims that such neglect was not a proximate cause of the accident, and the argument is, that inasmuch as Schram had, after the passage of the work train, misplaced the switch, but believed that he had closed and locked it so that trains could pass west on

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the main track, that it does not follow that had he remained in the yard, he would have again examined the track.

In other words, if he had remained and signaled the train, he would have done so without an examination of the switch, relying upon his mistaken notion that he had already closed and locked it; and also, that as it appeared in evidence that Schram, on some occasions, failed to signal the train in question, because he was engaged elsewhere in the yard, that it could not be assumed that such would not have been the case on the occasion of the accident.

We are of the opinion, however, that the jury were warranted in assuming that had Schram remained in the yard he would have complied with the rule, and performed his duties in reference to signaling the train. It appeared that the work train had crossed the main track about half an hour before the passenger train was due, and after the passage of that train, Schram omitted to close and lock the switch.

If he had remained in the yard, his duty would have been to have examined the switches again before the passenger train arrived, and before his signal was displayed, to see that they were properly set. The presumption that he would have done so must prevail. Here was an accident caused by the failure of a servant to perform a particular duty because of his absence from his post. We cannot assume that had he been at the yard, he would have neglected that which he was there to perform.

But the verdict of the jury does not depend upon any such refinement of argument, nor the defendant's liability rest upon the fact whether Schram might or might not have discerned the open switch had he remained in the yard, but upon the question whether defendant was negligent in retaining Schram in its employment after knowledge that he frequently neglected his duty.

This was a fact, as was the question whether Schram's habit in leaving the switch unattended, and going to his supper, was negligence.

There was evidence to justify the jury's conclusion upon both questions, and it was for them to say whether the negligence of the defendant so established was the cause of the accident.

We find no error in the record, and the judgment should be affirmed, with costs.

MASTER AND SERVANT — LIABILITY OF MASTER. — If there is a neglect to perform a single duty that he has impliedly contracted to perform toward his servant, the master is liable, though he delegated a fellow-servant to perform it for him: *Galveston etc. R'y Co. v. Smith*, 76 Tex. 611; 18 Am. St. Rep. 78.

MASTER AND SERVANT — INCOMPETENT FELLOW-SERVANT. — The master owes a duty to his servants of selecting competent fellow-servants, and is liable when, through his negligence, incompetent servants are employed: *Brennan v. Gordon*, 118 N. Y. 489; 16 Am. St. Rep. 775, and note.

AM. ST. REP., VOL. XIX. — 84

CASES
IN THE
SUPREME COURT
OF
NORTH CAROLINA.

TAYLOR v. POPP.

[106 NORTH CAROLINA, 267.]

PRACTICE — POWER TO CHANGE FINDINGS OF FACT. — The appellate court must adopt the findings of fact of the trial court, and cannot change or modify them in any respect in matters purely legal in their nature, as on motions to vacate orders of arrest or attachments, or to set aside judgments for mistake, inadvertence, excusable neglect, or the like.

PRACTICE — FINDINGS OF FACT — PRESUMPTION. — It is always presumed that the trial court prepared its own findings; and if, upon a careful consideration of the evidence, a judge found the facts to be the same as did his predecessor on a former occasion in the same matter, the mere fact that he adopted his predecessor's findings is not a ground for exception.

JUDGMENT BY DEFAULT IS PROPERLY SET ASIDE on the ground of surprise and excusable neglect, when such judgment was entered through the failure of counsel to act, after being engaged by defendant to enter a plea for him, and left in attendance upon the court. The counsel's laches as to his duty to enter an appearance and file proper pleadings cannot be attributed to defendant, and allowed to prejudice him.

APPEAL from a judgment setting aside a judgment obtained by default. The judgment appealed from was granted on the ground of excusable neglect on the part of defendant.

T. H. Sutton, W. E. Murchison, and N. W. Ray, for the appellants.

R. P. Buxton and D. H. McLean, for the respondent.

MERRIMON, C. J. This court has no authority to review, change, or modify, in any respect, the findings of fact by the court below in matters purely legal in their nature: *Coates v. Wilkes*, 92 N. C. 376. Nor has it such authority in motions to vacate orders of arrest, warrants of attachment, to set aside

judgments because of mistakes, inadvertence, excusable neglect, and the like: *Clegg v. New York W. Soapstone Co.*, 68 N. C. 391; *Greensboro v. Scott*, 84 N. C. 184; *Burke v. Turner*, 85 N. C. 500; *Hale v. Richardson*, 89 N. C. 62; *Winborne v. Johnson*, 95 N. C. 46; *Branch v. Walker*, 92 N. C. 87.

The counsel of the appellants insisted on the argument that it sufficiently appeared from the record that the court below had not considered all the evidence produced in opposition to the motion, and had not properly found the facts, in that it adjudged the findings of fact by another judge who had heard the evidence, etc. We must be governed by the record; and the court states therein that "after a careful consideration of the evidence by affidavits on both sides," it concurs with the former findings of fact by another judge. This implies, plainly, that the court had examined and considered all the evidence submitted, and it adopted the former findings, already drawn out and in writing, for convenience. That is the fair and reasonable inference. It is not to be presumed that a learned and just judge would trifle in the discharge of his duties by accepting the findings of fact by another that he ought himself to make. The presumption is to the contrary. If, upon a careful consideration of the evidence, the court found the facts to be as did his predecessor on a former like occasion in the same matter, the mere fact that he adopted the findings of fact as set down in writing is not good ground of exception or objection: *Silver Valley Mining Co. v. Baltimore Smelting Co.*, 99 N. C. 445.

This court must adopt the facts as found by the court below, and the single question presented by the record for its decision is, Was there, in any reasonable view of the facts as they appear, "mistake, inadvertence, surprise, or excusable neglect" on the part of the appellee defendant in his failure to appear and make defense to the action in time? If there was, then this court cannot review the exercise of discretion of the court below in granting the motion to set the judgment aside: *Branch v. Walker*, 92 N. C. 87; *Foley v. Blank*, 92 N. C. 476; *Beck v. Bellamy*, 93 N. C. 129; *Winborne v. Johnson*, 95 N. C. 46.

We think clearly there was "mistake, inadvertence, surprise, or excusable neglect," such as warranted the action of the court in granting the motion to set the judgment aside. The defendant manifestly intended in good faith to make defense in the action, and to that end, in apt time, employed

and instructed counsel to represent him therein. He attended the court at the return term for the purpose of giving attention to the action, and remained there four days, reminding his counsel, who was there, that he had been served with a summons returnable there and then. His counsel assured him that "he would attend to the case." With this assurance, he left the court, leaving his counsel still in attendance. He was thus reasonably diligent. His counsel was less so; but the latter was misled by his expectation that the action had been brought in the superior court of Harnett County, where, regularly, it should have been brought. The counsel's laches as to his duty to enter his appearance and file proper pleadings cannot be attributed to the defendant, and allowed to prejudice him.

In *Griel v. Vernon*, 65 N. C. 76, this court said: "In this case the party retained an attorney to enter a plea for him; that an attorney should fail to perform an engagement to do such an act as that, we think may fairly be conceded a surprise on the client; and that the omission of the client to examine the records in order to ascertain that it had been done was an excusable neglect." That case was recognized in the respect just mentioned, with approval, in *Bradford v. Coit*, 77 N. C. 72; and *Wynne v. Prairie*, 86 N. C. 73, *Francis v. Sutton*, 86 N. C. 78, *Geer v. Reams*, 89 N. C. 197, are all cases much in point and to the like effect.

It was objected further, that the defendant failed to execute and file with the clerk of the court an undertaking, as required by the statute (Code, sec. 237), in order to entitle him to plead in the action, and it was no part of the duty of the counsel to prepare and give such undertaking. But it must be said that the defendant was in attendance on the court for four days, to give attention for that or any other like purpose in the action, and, under the circumstances, was misled and chargeable with only excusable negligence. Moreover, if his counsel had entered his appearance, no doubt the court would, in view of the misleading facts and the diligence of the defendant, upon application of the counsel, have extended the time within which he might give the required undertaking.

On the argument, one or two other questions were discussed, but they are not presented by the record, and we are not called upon to advert to them.

There is no error. The judgment must be affirmed, and the action disposed of in the court below according to law.

APPELLATE PRACTICE — REVIEWING FINDINGS OF FACT. — Where the court finds a fact, it will no more be disturbed on appeal than will a verdict of a jury upon the facts of a case: *Tinges v. Meale*, 25 Md. 480; 90 Am. Dec. 73, and note.

JUDGMENT BY DEFAULT, WHEN MAY BE SET ASIDE. — As to what amounts to surprise, mistake, inadvertence, or excusable neglect on the part of a defendant, so as to entitle him to have a judgment by default against him set aside, see note to *Burnham v. Hays*, 58 Am. Dec. 397, 398. Ordinarily, the negligence of an attorney is imputed to his client, and the latter will not be released against a judgment obtained by the former's carelessness: *Spankling v. Thompson*, 12 Ind. 477; 72 Am. Dec. 221, and note; *Holloway v. Holloway*, 97 Mo. 628; 10 Am. St. Rep. 339.

SHARP v. DANVILLE, MOCKSVILLE, AND SOUTHWESTERN RAILROAD COMPANY.

[106 NORTH CAROLINA, 308.]

JUDGMENT BY CONFESSION — ATTACKING FOR FRAUD. — A judgment by confession is a final judgment, and in the absence of irregularity, cannot be attacked for fraud by motion in the cause. Such attack can be made only by bringing an independent and separate action.

JUDGMENT BY CONFESSION. — A CORPORATION MAY, in a proper case, and by its authorized officers, confess a judgment, the same as a natural person, by complying with all the essential requirements of the statute.

APPEAL from a judgment denying a motion to vacate certain judgments entered by confession on the ground of fraud. On November 7, 1885, J. T. Morehead was appointed receiver of the defendant company by the United States circuit court for the western district of North Carolina, in a suit in equity pending therein, wherein the Richmond etc. Railway and Warehouse Company was plaintiff, and the defendant company and its individual directors were defendants. On the same day that such receiver was appointed, but at a later hour, the directors of the defendant company held a meeting without giving public notice thereof, and authorized the secretary of such company to confess the judgments in dispute in favor of the plaintiff, T. R. Sharp, the president of such company, to whom it was indebted on certain drafts. The secretary of the company then handed the confession of judgments to the clerk of the proper court in the office of Mebane and Scott, counsel for the defendant company. This office was not the office of such clerk, nor was it in the courthouse, though near thereto. The clerk, however, was present, had the judgment docket of the county with him, and at once

entered the confessions of judgment on such docket. This occurred between eleven and twelve o'clock of the night of the same day on which the receiver was appointed. Upon these facts the court found that such judgments were regular, and declined to consider any allegations of fraud in the confession of the judgments, and denied the motion to vacate. J. T. Morehead, the receiver, excepted and appealed.

P. B. Means, for the appellant.

J. C. Buxton and C. B. Watson, for the respondent.

MERRIMON, C. J. The record presents no question as to the right of the appellant to have possession and control, as receiver, of the property of the defendant corporation; nor as to the rights of the complainants in the cause in equity mentioned, pending in the circuit court of the United States, as against such defendant or its property; nor as to the authority of the last-mentioned court to take jurisdiction and dispose of such property for proper purposes in the cause mentioned pending therein; nor as to how the judgment in this action, which the appellant seeks to have set aside or declared void, if it be valid, may affect adversely the complainants represented by the appellant, or any other persons. The motion of the appellant, if it be granted that he has a right to make it, raises no such question for our decision now. The judgments in question are final in their nature, and hence the motion is limited in its purpose and scope to the inquiry whether or not they are in any material respect irregular, and must, for irregularity, be set aside or declared void. It is well settled by many decisions that final judgments cannot be attacked for fraud by motion in the cause, and that this can only be done by an independent action brought for the purpose, the object being to avoid confusion, and to require a cause of action so serious to be litigated by regular formal pleadings. Indeed, the right to have a final judgment set aside because of fraud is, in a substantial sense, an independent cause of action, that should itself be the subject of a separate action.

It seems that the motions to set aside the judgments mentioned were treated as consolidated, and disposed of together, and they must be so treated here.

This is not an equitable motion of the class wherein it is the province of this court to review the findings of fact in respect thereto, and the matters and things embraced by it, by the court below, nor can this court go beyond its findings and hear

evidence and find other facts. If further findings of fact should be deemed necessary, this court might remand the case, to the end the same might be made.

We are unable to discover in either of the judgments any irregularity such as affects its substance and validity. What particular powers were conferred upon the defendant corporation and its officers, by its charter, do not appear; but it sufficiently appears that it was a business corporation, and, as such, under the general statutes of this state in respect to corporations, as well as general principles of law applicable, it might acquire and dispose of property, make and owe debts, sue and be sued. It was the duty of its directors to pay its debts and manage its general business matters, to bring necessary actions in its name, to vindicate its rights, and to defend actions brought against it. There is no reason, so far as appears, why the defendant might not confess a judgment in favor of its honest creditor, and in possible cases it might be just and promote its interests and convenience to do so.

Its directors, in meeting assembled, appointed and charged its special agent to confess the judgments in question in its name, in favor of the plaintiff therein. Nothing appears in the record to show that this might not be done in the orderly course of business, just as if it had been a natural person. The defendant could only appear and act by its agent in the way it did do.

The statute (Code, sec. 570) prescribes that "a judgment by confession may be entered, without action, either in or out of term, either for money due or to become due, or to secure any person against contingent liability on behalf of the defendant, or both, in the manner prescribed by this chapter." A distinguishing feature of such judgment is, that it must be confessed in the way prescribed, and entered of record either in term-time by the judge, or out of term by the clerk acting for the court, and without action. It may be founded on a debt due, or one to come due, or to secure the party to whom it is given against contingent liability, or it may embrace both such debts and liability.

But it is not sufficient to simply confess and enter judgment. It is essential that the confession and entry shall have the additional requisites further prescribed by the statute (Code, secs. 571, 572), which are, that "a statement in writing must be made, signed by the defendant and verified by his oath, to the following effect: 1. It must state the

amount for which judgment may be entered, and authorize the entry of the judgment therefor. 2. If it be for money due, or to become due, it must state concisely the facts out of which it arose, and must show that the sum confessed therefor is justly due, or to become due. 3. If it be for the purpose of securing the plaintiff against a contingent liability, it must state concisely the facts constituting the liability, and must show that the sum confessed therefor does not exceed the same. The statement may be filed with the clerk of the superior court of the county in which the defendant resides, or if he does not reside in the state, of some county in which he has property. The clerk shall indorse upon it and enter on his judgment docket a judgment of the court for the amount confessed, with three dollars costs, together with disbursements. The statement and affidavit, with the judgment indorsed, shall thenceforth become the judgment roll," etc. It is essential that these requirements shall be observed,—certainly, substantially in every respect. The judgment is given out of the ordinary course of procedure, but nevertheless it at once, when docketed, becomes a lien upon the judgment debtor's real property. The purpose of such particular requisites is to give assurance that the consideration underlying the judgment is fair and honest; that the judgment was so confessed *bona fide*; to point to the grounds of indebtedness of the debtor, or the liability provided against, so that another creditor may scrutinize the honesty and good faith of the judgment and the debts for which it was given.

The judgments in question possess, substantially, all the requisites thus prescribed. The statement, in writing, of the first one mentioned is signed by the defendant, by its agent, and sworn to by him. It states, with particularity, the precise amount of the liability, and the grounds thereof, provided against; and the statement, as made fuller by a sworn exhibit of details, points to the grounds of the liability with such certainty and such detail as to enable a creditor who might scrutinize it to show, with reasonable effort, that it was not true, if, indeed, it were not so. As to the first draft mentioned, the consideration thereof is particularly specified, and it appears that the defendant got the benefit of it. As to the second draft, it appears that the money realized from it was for the use and benefit of the defendant. In addition, it was drawn by and on itself, and indorsed by the plaintiff. As to the third ground of liability, it could not be mistaken. The

facts stated point to it with such certainty as to make it easy to verify it.

The same may be said as to the second judgment. The second statement, aided by the sworn exhibit connected therewith, shows a detailed account of the dealings between the plaintiff and defendant,—the balance due to him and the items of charge making up the whole. These supply the *data* to any creditor who might wish to contest the defendant's indebtedness to the plaintiff on the several accounts specified.

The statements were filed with the clerk of the superior court of the proper county. He entered the judgment confessed on each, and also on his judgment docket. Such statement, with the entry of judgment thereon, made up the judgment roll, to be seen, examined, and scrutinized by any person interested. The mere facts that the judgments were entered in the night-time, and in the law office of counsel, near to the court-house, for convenience, did not render them void or irregular. The clerk of the court, the proper officer, near to his office, having the proper judgment docket with him, received the statements, and entered the judgments on that docket and on the statements respectively. The judgments so confessed, the judgment docket, and the judgment roll were next and ever thereafter in their proper places in the office and custody of the clerk, and thus the requirements of the law were, in all material respects, observed: *McAden v. Hooker*, 74 N. C. 24; *Davidson v. Alexander*, 84 N. C. 621; *Davenport v. Leary*, 95 N. C. 203.

The statute prescribes the method and order to be observed in confessing judgments without action. That method and order was, in all material respects, observed as to the judgments in question, and we so declare. It may be they were affected with fraud, but any question in that respect is not now before us. The court below properly declined to consider the allegations of fraud, and the evidence tending to prove the same and the contrary.

Judgment affirmed.

JUDGMENT BY CONFESSION. — A judgment by confession cannot be attacked collaterally for fraud by the judgment debtor's creditors; it can only be impeached in a direct proceeding for that purpose: *Lee v. Figg*, 37 Cal. 328; 99 Am. Dec. 271, and note.

UNION NATIONAL BANK OF CHICAGO v. MILLER.

[108 NORTH CAROLINA, 347.]

CONTRACT BY TELEGRAPH, TIME AS ESSENCE OF. — Where, through telegraphic correspondence, an offer to sell goods is answered with an offer to buy at a certain price, with the condition added, "Must have reply early to-morrow," such condition is a stipulation for a reply within that time; and when it is not received until late in the evening of that day, and in the absence of proof that the condition was complied with, the contract is not complete, and the title will not pass as against an attachment levied on that day before the reply was received.

ACTION to recover property alleged to have been wrongfully attached. Judgment for the defendant, and plaintiff appeals.

P. D. Walker, for the appellant.

C. W. Tillett, for the respondent.

SHEPHERD, J. The only question necessary to be considered in disposing of this appeal involves the correctness of his honor's instruction, that the title to the property had, by reason of the telegraphic correspondence, passed out of the plaintiff and into Van Landingham at the time of the levy of the attachment.

The property was in Charlotte, in the possession of a common carrier, and on the 26th of November, 1888, Van Landingham made the following offer, by telegraph, to the plaintiff's agent at Chicago:—

"CHARLOTTE, N. C., November 26, 1888.

"To GREGG, GARVEY, & Co.

"Nineteen dollars per ton. Must have reply early to-morrow.
JNO. VAN LANDINGHAM."

On the next day, at 5:34, P. M., Van Landingham received a telegram from the said agents, accepting the offer. This latter telegram was sent from Chicago before, but was not received by Van Landingham until after, the levy of the attachment.

His honor held that the contract was complete when the telegram was sent from Chicago, and the title to the property having passed to Van Landingham before the alleged conversion, the plaintiff could not recover.

In the cases of *Crook v. Cowan*, 64 N. C. 743, and *Ober v. Smith*, 78 N. C. 313, it was held that where there was a delivery to a carrier in pursuance of an "unconditional and specific order," the contract was complete; but it has never been distinctly decided in this state whether, in the absence

of such a delivery of the property, the mere dispatching of an acceptance by post or telegraph has the effect of consummating a contract at the time of such dispatching. Upon this point the authorities are conflicting. It is, however, unnecessary to decide the question in this case, for, granting the affirmative of the proposition, we are of the opinion that under the peculiar terms of this correspondence, and in view of the testimony, the court was not warranted in charging the jury that the title vested in Van Landingham at the time the telegram was sent. It does not appear that it was sent early in the day, according to the terms of the offer, and it was incumbent on the defendant to have shown this fact before he could avail himself of the principle contended for.

"In our law the effect of naming a definite time in the proposal is simply negative, and for the proposer's benefit; that is, it operates as a warning that an acceptance will not be received after the lapse of the time named. In fact, the proposal so limited comes to an end itself at the end of that time, and there is nothing for the other party to accept": Pollock on Contracts, 9; *Larmon v. Jordan*, 56 Ill. 204; *Boston & M. R. R. Co. v. Bartlett*, 3 Cush. 224; *Mactiers v. Frith*, 6 Wend. 103; 21 Am. Dec. 262; *Cheney v. Cook*, 7 Wis. 413.

The principle is well illustrated by the following extract from the opinion of the court in *Maclay v. Harvey*, 90 Ill. 525: "It was said by the lord chancellor, in *Dunlop v. Higgins*, 1 H. L. Cas. 887, that where an individual makes an offer by post, stipulating for, or by the nature of the business having the right to expect, an answer by return of post, the offer can only endure for a limited time, and the making of it is accompanied by an implied stipulation that the answer shall be sent by return of post. If that implied stipulation is not satisfied, the person making the offer is released from it. When a person seeks to acquire a right, he is bound to act with a degree of strictness, such as may not be required where he is only endeavoring to excuse himself from a liability." This is regarded as a leading case on the question of acceptance of contract by letter, and the language quoted we regard as a clear and accurate statement of the law as applicable to the present case. It is clear here that the nature of the business demanded a prompt answer, and the words "You will confer a favor by giving me your answer by return mail" do, in effect, "stipulate" for an answer by "return mail." The same principles apply to correspondence

by telegraph: *Trevor v. Wood*, 36 N. Y. 307; 93 Am. Dec. 511.

Under this view of the law, which is well sustained both by reason and authority, the requirement of the offerer, Van Landingham, "that he must have a reply early to-morrow," cannot be regarded otherwise than as a stipulation for an acceptance within that time, and as the defendant has not shown a compliance with such stipulation, it must follow that there was error on the part of his honor in charging the jury that the mere sending of the acceptance before the levy operated to transfer the title. The offer was limited to early in the day. The acceptance was not received until late in the evening. Even conceding that the contract would be complete from the sending of the dispatch, there is, as we have said, no testimony to show that it was sent within the time limited by the offer.

The title, therefore, did not pass: Benjamin on Sales, 3d Am. ed., 48, note. For these reasons, we are of the opinion that there should be a new trial.

TELEGRAPHS — CONTRACTS. — The law respecting contracts made by telegraph constitutes the subject of a note to *Trevor v. Wood*, 93 Am. Dec. 514-517. The acceptance of an offer, after the time limited therein, cannot bind the person making the offer: *Attes v. Bartholomew*, 69 Wis. 43; 5 Am. St. Rep. 103.

MOSSELLER v. DEAVER.

[106 NORTH CAROLINA, 34.]

FORCIBLE ENTRY — TRESPASS — MEASURE OF DAMAGES. — A forcible entry by the owner or his agent against one in the peaceable possession of lands, who is not a recent trespasser or intruder, is a trespass, without regard to the amount of force used, for which nominal damages may always be recovered, and also such damages as are inflicted on the person or fixtures of the party in possession. Exemplary damages, if the unlawful entry was done in a wanton or reckless manner, may also be awarded.

ACTION for damages for trespass.

T. F. Davidson, for the appellant.

M. E. Carter, for the respondents.

SHEPHERD, J. The plaintiff had been in possession of the strip of land in controversy from 1884 to March, 1888. Whether he entered under the defendant Wilson, the owner,

and terms under which he entered, are disputed questions. It is admitted, however, that in March, 1887, Wilson, after giving the plaintiff notice to quit, agreed that he should remain upon the land until the succeeding October. The plaintiff continued in possession until March, 1888, when, without any further notice, he was forcibly ejected by the *feme* defendant, Deaver, a negro, who was acting under the direction and authority of the said Wilson. The entry was made while the plaintiff was in the actual possession of his house, and in his presence, and was done under such circumstances as to constitute a forcible entry under the statute, if not, indeed, an indictable forcible trespass. His honor charged the jury that if the plaintiff was not the tenant of Wilson, the latter, and those acting under him, "had the right to go there and put him out by force, if no more force was used than was necessary for that purpose." Under the circumstances of this case (the plaintiff not being a recent trespasser or intruder), we cannot approve of the instruction given, as it is not only opposed to the public policy, which requires the owner to use peaceful means or resort to the courts in order to regain his possession, but is directed contrary to a statute which condemns the violent act as a criminal offense.

In *Dustin v. Cowdry*, 28 Vt. 681, Redfield, J., said: "We entertain no doubt that such a principle of law . . . did exist in England from the time of the Norman conqueror until the statute of 5 Richard II., chapter 8, of forcible entry and detainer, a period of nearly three hundred years; . . . and it is certain, we think, that such a mode of reducing rights of action to possession is more suited to the turbulence and violence of those early times, when no man whose head was of much importance to the state felt secure of retaining it upon his shoulders for an hour, than to the quiet and order and general harmony of the nineteenth century. . . . But as men advanced towards equality, and claimed to have their rights respected and guaranteed to them, and more carefully defined, this state of law became intolerable, and was among the first to be abrogated by Parliament." This was done by the statute of 5 Richard II., which is substantially enacted in North Carolina (Code, sec. 1028), and in many other states of this Union. "A contrary rule," says Lawrence, J., in *Reeder v. Purdy*, 41 Ill. 279, "befits only that condition of society in which the principle is recognized that, —

"He may take who has the power,
And he may keep who can."

If the right to use force be once admitted, it must necessarily follow, as a logical sequence, that so much may be used as shall be necessary to overcome resistance, even to the taking of human life."

Nearly all the authorities agree that such forcible entries on the part of the owner are unlawful; but there is a great diversity as to whether an action of trespass *quare clausum fregit* may be maintained, and also whether the defendant can justify under the plea of *liberum tenementum*.

Erskine, J., in *Newton v. Harland*, 39 Eng. Com. L. 581, said that "it is remarkable that a question so likely to arise should never have been directly brought before any of the courts sitting in bank" until that case, which was tried in 1840; and it is also worthy of remark that Ruffin, C. J., in *State v. Whitfield*, 8 Ired. 317, regarded it as still an open question in North Carolina.

In the conflict of authorities we must adopt that rule which, in our judgment, rests upon the sounder reason. This is so well expressed by the court in *Reeder v. Purdy*, 41 Ill. 279, that we will reproduce the language of the learned justice who delivered the opinion. He says: "The reasoning upon which we rest our conclusion lies in the briefest compass, and is hardly more than a simple syllogism. The statute of forcible entry and detainer, not in terms, but by necessary construction, forbids a forcible entry, even by the owner, upon the actual possession of another. Such entry is therefore unlawful. If unlawful, it is a trespass, and an action for the trespass must necessarily lie. . . . Although the occupant may maintain trespass against the owner for a forcible entry, yet he can only recover such damages as have directly accrued to him from injuries done to his person or property through the wrongful invasion of his possession, and such exemplary damages as the jury may (under proper instructions) think proper to give. But a person having no title to the premises clearly cannot recover damages for any injury done to them by him who has the title." He may, however, says the court, recover nominal damages in all cases of forcible entry and detainer, and this, in our opinion, is the correct view of the law. It is strongly sustained in *Newton v. Harland*, 39 Eng. Com. L. 581, though the point is not distinctly decided. In that case, Bosanquet, J., agreeing with Tindal, C. J., in holding that "if the act be expressly prohibited by statute, it must . . . be illegal and void." See also Cooley on Torts,

823, 824. Our conclusion, therefore, is, that there having been a forcible entry upon the peaceable possession of the plaintiff, he is entitled to recover nominal damages for the trespass. He is also entitled to recover damages for any injury inflicted upon his person, his furniture, his tools, and even his house, if it is a fixture only. There may also be awarded exemplary damage, if the unlawful act be done in a wanton and reckless manner. The complaint alleges such injuries, and it was error on the part of the court in making the case turn upon the question whether the force used was necessary to the expulsion of the plaintiff, as we have seen that the forcible entry was unlawful; without reference to the amount of force necessary to effectuate the purpose of the plaintiff. We are also of the opinion that the incompetent collateral matter admitted by the court must have had a prejudicial effect against the plaintiff.

For the reasons given, there must be a new trial.

THE CASE of *Roberts v. Preston*, 106 N. C. 411, was a civil action of trespass for the alleged unlawful entry of defendant. The parties claimed title to different parcels of land from a common grantor, and the dispute was in relation to the boundary line between them. At the trial, the defendant introduced a deed executed in 1863, under which he claimed, and which described the land as "beginning on the sound, at a ditch." On the part of plaintiff, it was contended that this beginning was at a certain point where the ditch entered the sound, while the defendant contended that the beginning was at another point, where there was no ditch at the time of the trial. A surveyor testified that he had surveyed the line as contended for by the defendant; that if a ditch had entered the sound at the point contended for by defendant, in 1863, it would be difficult to distinguish it at the present time; and that he had located such point as the beginning-corner by a deed to an adjoining tract. There was evidence that a ditch approached within eighty yards of the point contended for by defendant, where a swamp intervened; that such ditch seemed to have been cut for a drain, but was not now distinguishable at the point above mentioned; that nails in certain gate-posts and trees marking a line of water-fence were found in 1887 running from the swamp to the sound, in line with such ditch. The court deemed this evidence sufficient to warrant the jury in finding that the point of beginning was at the point contended for by defendant, which would establish his title to the land upon which the alleged trespass was committed. He then, being the owner, would have the right to enter peaceably on it as against an occupant having no title or right of possession, and after effecting an entry, might put any person in possession of all or any part of the land, under him, or do any act in relation to it that he might lawfully do with his own land; nor could the party in wrongful possession maintain trespass against the lawful owner who has thus entered peaceably, or against those in possession under him. In this connection, the court said: "Unquestionably, the owner of land having the right of possession may peaceably enter upon it, while another person, who has no right, has previously taken and has pos-

session thereof. When the lawful owner thus enters and takes possession, the possession extends to the whole tract, unless a person is in the wrongful possession of some part, in which case his wrongful possession is confined to the part of which he has actual possession. When the lawful owner thus takes possession, the law favors and helps him in the assertion of his right. Thus he has perfect title, and he may do whatever he may lawfully do with his own property. He cannot be treated as a trespasser in such case. He may put his agents and servants in possession of the land, or any part of it, under him, and may authorize other persons to cut timber, construct roads, and do other things on his land, and have the right to ingress, egress, and regress. Nor can the person having such wrongful possession maintain trespass in such case against the lawful owner or those in possession under him, or cutting timber and doing other like things on the land by his permission or direction. This is so, because he goes into and has possession of rights; *Ring v. King*, 4 Dev. & B. 164; *Tredwell v. Reddick*, 1 Ired. 56; *Everett v. Smith*, Bush. 303; *White v. Cooper*, 8 Jones, 48; *Gadsby v. Dyer*, 91 N. C. 311; *Logan v. Fitzgerald*, 92 N. C. 644; *Gaylord v. Respass*, 92 N. C. 553; *Nixon v. Williams*, 95 N. C. 103."

RIGHT OF OWNER OF LAND TO EFFECT AN ENTRY THEREON. — While there are decisions of courts of undoubted learning and respectability sustaining the rule which obtained at common law, that the owner of land may enter against the will of the occupant and use all necessary force to obtain possession from him who may wrongfully withhold it, without committing a trespass, still, we believe that this right has been taken away by the statutes of forcible entry and detainer enacted in most of the states, and that the current of modern authority is clearly opposed to such rule. The prevailing doctrine under decisions on the forcible entry and detainer acts is correctly announced by the supreme court of the United States in the case of *Iron Mountain etc. R. R. Co. v. Johnson*, 119 U. S. 608-611, where it was said that "the general purpose of these statutes is, that, not regarding the actual condition of the title to the property, where any person is in the peaceable and quiet possession of it, he shall not be turned out by strong hand, by force, by violence, or by terror. The party so using force and acquiring possession may have the superior title, or may have the better right to the present possession; but the policy of the law in this class of cases is to prevent disturbances of the public peace, to forbid any person righting himself in a case of that kind by his own hand and by violence, and to require that the party who has in this manner obtained possession shall restore it to the party from whom it has been obtained, and then when the parties are *statu quo*, or in the same position that they were before the use of violence, the party out of possession must resort to legal means to obtain his possession, as he should have done in the first instance. This is the philosophy which lies at the foundation of all these actions of forcible entry and detainer, which are declared not to have relation to the condition of the title, or to the absolute right of possession, but to compelling the party out of possession, who desires to recover it of a person in the peaceable possession, to respect and resort to the law alone to obtain what he claims. It occurs to us that this principle is as fully applicable to the possession of a railroad, or a part of a railroad, as to any other class of landed interests. And in fact, that, of all owners or claimants of real estate, large corporations, with vast bodies of employees and servants ready to execute their orders, are the last persons who should be permitted to right themselves by force. The language of the presiding judge in his charge to the jury in this case meets

our entire approval, and we quote from it as follows: 'The law will not sanction or support a possession acquired by such means, but will, on the contrary, when appealed to in this form of action, compel the party who thus gains possession to surrender it to the party whom he dispossessed, without inquiring which party owns the property or has the legal right to the possession. If the law was otherwise, force, the exhibition and use of deadly weapons, and threats of personal violence, would speedily take the place of lawful and peaceful methods of gaining the possession of property. The law compels a defendant found guilty of forcible entry and detainer to restore the possession. After he has restored the possession thus wrongfully and forcibly acquired, he can then proceed in a lawful manner to assert his claim to the property, but he cannot have his legal rights to the property or its possession adjudged or determined in the action of forcible entry and detainer, when, by his own admission or the proof in the case, he is shown to be guilty of a forcible entry and detainer.'

These views are in accord with those expressed in *Sinclair v. Stanley*, 69 Tex. 718-727. The cases which adopt this view of the law generally maintain, that the owner of land which is in the peaceable possession and occupancy of another, though without right, cannot enter by force against the will of the occupant and expel him therefrom, without rendering himself liable in trespass to the party thus forcibly dispossessed: *Wescott v. Arbuckle*, 12 Ill. App. 577; *Reeder v. Purdy*, 41 Ill. 279; *Emerson v. Sturgeon*, 59 Mo. 404; *Dilworth v. Fee*, 52 Mo. 130; *Hoffman v. Harrington*, 22 Mich. 52; *Dustin v. Cowdry*, 23 Vt. 631. In approving this doctrine in *Farwell v. Warren*, 51 Ill. 467, the court stated that the owner in fee has no right to make a forcible entry on the tenant holding over, or upon any other person wrongfully in possession. The law has given him an action, and he must resort to it. To the same effect is *Larkin v. Avery*, 23 Conn. 304. In the subsequent case of *Mason v. Hawes*, 52 Conn. 12, it was decided that where a landlord was entitled to the possession of leased premises, he had no right to enter during the temporary absence of the tenant and afterwards maintain possession by force, without being liable in trespass.

It is sometimes maintained that while the tenant cannot maintain trespass *quare clausum* for the forcible entry, still he may maintain trespass against the landlord for any personal injury inflicted upon him: *Sampson v. Henry*, 13 Pick. 36. Thus where a tenant at will of a house remains in possession after notice to quit, he cannot maintain an action of trespass *quare clausum* against the landlord for entering the house with force and taking away the windows and inside doors thereof: *Meador v. Stone*, 7 Met. 147. Other cases decide, however, that although the entry upon real estate to terminate a tenancy at will may be lawful, yet if the owner thrusts out the tenant with force and violence, or without allowing him a reasonable time to remove, the act is unlawful, and such a violation of the right of occupation for a special purpose as enables the tenant to maintain trespass *quare clausum*: *Moore v. Boyd*, 24 Me. 242; *Bryant v. Sparrow*, 62 Me. 546.

A disseisee who enters upon the land of which he is disseised, and removes a fence therefrom against the wishes of the disseisor, is liable to an action of trespass for damages by the latter, although the entry is made without a breach of the peace, and the effect of it, followed by abandonment by the disseisor, is to give the disseisee a good title to the land: *Rawson v. Putnam*, 128 Mass. 552. As to what is a forcible entry within the meaning of the rule stated above, see the note to *Mill v. Connell*, 18 Am. Dec. 188.

In some jurisdictions, however, a different rule prevails, as in *Senter v. Am. St. Rsp.*, Vol. XIX. — 35

Codman, 14 R. I. 119, 51 Am. Rep. 361, where it was determined that the owner of land may expel, with reasonable force, a wrongful occupant without being liable to a civil action of trespass for damages, although he may be liable criminally for a breach of the peace or for the forcible entry; and see the note to this case, at pages 366 et seq., treating the subject at some length and drawing the conclusion reached in the case there reported. The subject under consideration here is also discussed in a note appended to *State v. Ross*, 4 Jones, 315, 69 Am. Dec. 751, where the conflicting decisions are collected and commented upon, and a conclusion reached, from the weight of early authority, in accord with that expressed in *Souter v. Colman*, 14 R. I. 119; 51 Am. Rep. 361. This doctrine seems to pre ail in New York, as shown by *Estes v. Kelsey*, 8 Wend. 555; *Gault v. Jenkins*, 12 Wend. 488; *Jackson v. Farmer*, 9 Wend. 201. Even there if the amount of force used to expel the party amounts to violence, the owner is liable for assault and battery. In *Wood v. Phillips*, 43 N. Y. 152, the court decided that a tenant in common has a right to take peaceable possession of the common premises, and even if such possession is obtained by stealth, without tumult or breach of the peace, it will not be illegal; still, one co-tenant has no right to oust or debar his co-tenant from the joint possession, and if such co-tenant, after overcoming the attempt to oust him, lays hands upon his co-tenant, and ousts him by force, he will be liable for an assault and battery.

In the case of *Johnson v. Hannahan*, 1 Strob. 313, the doctrine of the common law was applied, and it was there decided that an owner was not liable in trespass for entering upon his own land in the wrongful possession of another, and exercising rights of ownership; nor could any unlawful acts, committed in the exercise of such right, be so connected with the entry as to make him liable in damages to plaintiff as a trespasser *ab initio*. In *Barnes v. Dean*, 5 Watts, 543, the same rule was adopted, where the owner forcibly entered, cut and carried away the grain and grass of one in the wrongful possession. The court said: "At the common law, an entry by force was justifiable both civilly and criminally, with the single qualification that wanton violence was not used. The owner was not at liberty to beat the intruder, but he might overcome resistance by force, or as the law expresses it, 'gently lay hands on him'; but no degree of violence to objects that are part of the freehold could make him answerable by indictment or action. The frequency of actual collision from this induced the legislature to interfere for the preservation of the public peace, but not for the disturbance of private rights. The statutes of forcible entry declare many things criminal in relation to the public that are entirely justifiable between the parties; and this is one of them. That the common law remains the same as to the remedy by action is shown by the pleadings. The parties have put the question exclusively on the defendant's title to the freehold, and it was error to lead the jury to a decision of it on anything else."

Where the owner of land having the right to immediate possession enters thereon quietly and peaceably, or without force or violence, he is not liable in trespass to the wrongful occupant: *Fort Dearborn Lodge v. Klein*, 115 Ill. 177; 56 Am. Rep. 133. In deciding the case, the court said: "Is there not a manifest inconsistency in conceding one to be the paramount owner of land, with a right to the immediate possession thereof, and yet maintain that if he, in a quiet and peaceable manner, enters upon the land thus owned by him, he may by doing so become liable in trespass to one who has neither a right of property therein, nor a right to the possession? If one can recover in such case, his recovery will be on account of a thing—the

possession — to which he had no right, and against the person who had the right to that very thing. The case suggested is not the case of one doing a lawful act in an illegal manner. A tort, or even a crime, may well be committed by doing a lawful act in an illegal manner, and no case illustrates the principle better than that of the owner of land, having a right to enter, who takes possession in a forcible and violent manner. . . . The distinction between actual and implied force is fully drawn, and the English and American courts generally, in giving effect to the law governing the action of trespass to real property, as well as to the forcible entry and detainer laws, have consistently kept this distinction in view. While they hold the owner of the land criminally liable for an entry thereon with actual force, without regard to whether he has a right of entry or not, and in some cases, where the occupant has been expelled from the premises, will, as part of the punishment, compel the owner to restore him to the possession, and thus place the parties *in statu quo*, yet such forcible entry, by one having the present right of entry, would not, at common law, sustain an action of trespass at the suit of the occupant wrongfully withholding the possession of it from the rightful owner." Then, in construing the act of forcible entry and detainer, the court said: "It is clear, then, from the very words of the statute, that the paramount owner of a tract of land, having a present right of immediate possession, may enter the same in a peaceable manner, though occupied by another, and he will not, by reason of such entry, become a trespasser."

When a tenancy has been legally terminated by the landlord, he may peaceably enter the premises, whether he disclose or conceal his intention of entering for the purpose of removing the tenant, and after effecting such entry by peace, he may use such force as is necessary in expelling the tenant; and if the latter, having a reasonable time and opportunity to remove his goods, fails to do so, the landlord may remove and deposit them with due care in some near and convenient place: *Stearns v. Sampson*, 59 Mo. 568; 8 Am. Rep. 442. To the same effect, *Rollins v. Mooers*, 25 Me. 192; *Clark v. Keliker*, 107 Mass. 406.

Although a forcible entry is forbidden, still a forcible detainer after a peaceable entry is not forbidden, unless the detainer is unlawful: *Hoffman v. Harrington*, 22 Mich. 52. And where a person is in possession under a void title, and another, having a valid title, peaceably enters and takes possession, the latter is not a trespasser: *Sharon v. Woodrick*, 18 Minn. 354.

BOYER v. TEAGUE.

[106 NORTH CAROLINA, 576.]

ELECTIONS — CONTEST — SUFFICIENCY OF COMPLAINT. — A complaint in a contested election case which states the aggregate number of illegal votes alleged to have been cast for the defendant, the grounds upon which the charges of illegality are based as to each class, and when and where the votes were polled, is sufficient; and the defendant cannot claim as of right, by bill of particulars, a fuller and more definite specification of what the contestant expects to prove. A contestant of an election in a notice or a pleading need not give the contestee the name of every alleged illegal voter as to whom he proposes to offer proof.

ELECTIONS — JURY — CHALLENGE TO THE ARRAY. — Where a sheriff, who is the contestee in an action involving the title to his office, knows that

the case is set for hearing at a special term, and in selecting the jurors for that term himself takes the names from a box who draws them from a box, the former reading them to the county commissioners without their seeing the names, and then passing them into a locked box, this is such an irregularity as furnishes sufficient ground for a challenge to the array under the code of North Carolina, sections 1722-1730, prescribing the qualifications and mode of selecting and drawing jurors for special terms by county commissioners, and providing that the sheriff need not act in such case, except when such commissioners neglect to act.

JURY AND JURORS — SUMMONING NEW PANEL AFTER CHALLENGE TO ARRAY. — Under a statute authorizing the appointment by the judge of some suitable person to summon jurors from the by-standers in certain cases, where the sheriff is a party to or interested in the suit, the court may appoint such party to summon a new panel from the by-standers, when a challenge to the array has been sustained for sufficient cause, and this though the action was commenced before the enactment of the statute.

ELECTIONS. — QUALIFIED ELECTOR of North Carolina is one who has come into the state one year before the election, or has been domiciled within it for that time after forming the purpose to remain; and the intent must be concurrent with the actual occupation of a domicile in the county, to entitle him to the rights of an elector.

ELECTIONS — QUALIFIED ELECTOR — EVIDENCE — DOMICILE IS OFTEN A QUESTION OF INTENT, and the declarations of an elector, made at the time of voting, are admissible as part of the *res gestæ*, and, if made previous to that time, are admissible, if in disparagement of his right.

ELECTIONS. — ELECTORS MAY REFUSE TO DISCLOSE FOR WHOM THEY VOTED, when under oath as witnesses, when they have complied with the law. This privilege, however, is an entirely personal one.

ELECTIONS — CONTEST — EVIDENCE OF ELECTORS. — As between contestants for an office, the testimony of an elector, if pertinent and relevant, is always admissible, and neither of the parties is called upon to contend for the rights of a witness who does not demand protection, and if compelled to testify against his will, the evidence, competent without objection on his part, should go to the jury for what it is worth.

ELECTION — CONTEST COMPELLING ELECTOR TO TELL FOR WHOM HE VOTED. — The judge who tries a contested election case may, in the exercise of his discretion, determine, certainly as between the contestant and contestee, if there is any evidence at all, how much testimony tending to show the illegality of a particular vote is sufficient as a foundation for compelling the voter to tell for whom he voted.

ELECTION — CONTEST — EVIDENCE TO SHOW FOR WHOM BALLOT WAS CAST. — Where, in an election contest, it does not appear from the direct evidence of the voter for whom his ballot was cast, circumstantial evidence is admissible to establish the fact, and the court may pass upon its sufficiency at any time as a foundation for compelling him to testify, the jury to determine from the evidence for whom the ballot is to be counted.

ELECTIONS — CONTEST — EVIDENCE TO SHOW FOR WHOM BALLOT WAS VOTED. — In a contested election case, where a certain person was engaged on the day of election in handing out ballots for one of the contesting parties, and for no other person, and he gave a ticket to a certain person, and "voted him," evidence of these facts is competent to show for whom such person voted.

ELECTIONS — EVIDENCE OF FRAUDULENT VOTE. — The identity of a voter being established, the record of his indictment and conviction is admissible to prove that he voted fraudulently.

WITNESS IS COMPETENT TO TESTIFY to a fact of the truth of which he says he feels reasonably certain.

ELECTIONS — CONTEST. — **EVIDENCE OF HOW A CHALLENGED ELECTOR WOULD HAVE VOTED**, or offered to vote, who, on account of the number of voters, failed to have his challenge heard, and failed to vote, is inadmissible in a contested election case.

ELECTIONS. — **EXCLUSION OF LEGAL VOTES**, not fraudulently, but through error of judgment, will not defeat an election, notwithstanding the error is one which there is no mode of correcting, since it cannot be shown with certainty, afterwards, how the excluded voters would have voted.

ELECTIONS — EVIDENCE TO SHOW FOR WHOM BALLOT WAS VOTED. — In a contested election case, evidence that a voter obtained a ballot from a table at the polls, where only one of the contesting parties' ballots were distributed, and that it was obtained from his known agent, and that the voter "came down the line within the ropes, and voted," is admissible as tending to show for whom the ballot was voted.

ELECTIONS — EVIDENCE OF QUALIFICATION OF ELECTOR. — In a contested election case, evidence of the declaration of a person, when offering to vote, to the effect that he was but twenty years of age, is admissible to establish his minority, although, at the time, a stranger swore that such person was over twenty-one years of age.

ELECTIONS — EVIDENCE OF QUALIFICATION OF VOTERS. — In a contested election case, evidence that certain voters were, at the time of the election, residents of another county, is admissible to establish the illegality of their votes.

ELECTION — QUALIFICATION OF ELECTOR. — Where an elector has been in the habit of leaving his home in another county every year, and coming into the county where the election was held, for the purpose of working, and then returning to the other county when the season was over, but testifies that he considers the county where the election was held his home, the question of his residence is for the jury.

ELECTIONS — EVIDENCE OF QUALIFICATION OF VOTER. — In a contested election case, the evidence of a tax collector for the precinct where the election was held, that he made it his duty to ascertain the residence of every person in the precinct, and that a certain voter was never there until a few months before election, never paid taxes there, and that the day following the election he saw him buy a railroad ticket for an adjoining state, from which he did not return, is admissible to show that such voter never acquired a residence in the precinct in which he voted.

ELECTIONS — BURDEN OF PROOF AS TO ILLEGALITY OF BALLOT. — When an elector is allowed to vote, the burden is on the one who assails the validity of the vote to show, by a preponderance of evidence, the truth of such facts or circumstances as are relied upon to establish the disqualification.

PRACTICE. — **FORM AND NUMBER OF ISSUES** submitted must be determined by the trial judge, in the exercise of a sound discretion, provided they are always such as will justify the entry of judgment, and provide the appellant an opportunity to present to the court below, or on appeal, any view of the law applicable to the evidence.

ELECTIONS — REGISTRATION — REMOVAL. — A registered voter in one precinct who desires to remove to another precinct in the same county

must procure a certificate of removal; and if he registers and votes in the latter precinct without such certificate, his vote is illegal and void.

ELECTIONS. — REGISTRATION OF VOTER ON DAY OF ELECTION is illegal, unless the voter becomes of age on that day, or shows to the judges of election that for some other good reason he has become entitled to vote.

ELECTIONS — REGISTRATION OF VOTER. — Where the registrar of voters receives a certificate of removal outside his township, administers the proper oath to the voter, and enters his name on the registration-book after his return home, the registration is valid, although he did not have such book with him when he received the certificate of removal.

ELECTIONS — QUALIFICATION OF VOTER. — One whose true residence is in one township is not a qualified voter of another, where, after escaping from prison, he is hiding as a fugitive from justice.

CONTESTED election case to try the title to the office of sheriff. The action was commenced at a special term of court. The defendant had been duly declared elected, and inducted into office. The plaintiff claimed that illegal votes had been cast for defendant in sufficient numbers to nullify his election, and give title to the office to plaintiff. Defendant alleged that illegal votes had been cast for plaintiff, which should be deducted from his total received; but he introduced no evidence to substantiate his allegations. Plaintiff challenged the array of the jury, drawn for the special term at which the case was tried, before such jury was called and impaneled. The challenge was allowed, and defendant excepted to the ruling, as he also did to the admission of certain evidence and instructions given.

W. S. Ball and L. M. Scott, for the appellant.

C. B. Watson, J. C. Buxton, and R. B. Glenn, for the respondent.

AVERY, J. The motion made at the February term, 1889, to compel the plaintiff to file a bill of particulars, rested upon the ground that the second paragraph of the original complaint was not sufficiently definite. The section referred to was as follows: —

“2. That the relator, John Boyer, at said election, as he is informed and believes, received a majority of all the legal votes cast, and was duly elected to fill the said office of sheriff of said county for the said term of two years, but notwithstanding the relator received said majority of the lawful votes cast and was duly elected to said office, the defendant, M. E. Teague, against the protest of the relator and against his consent, has

been unlawfully inducted into said office, and now unlawfully usurps the office to which the relator was elected, and is wrongfully and unlawfully holding the same, and receiving the profits and emoluments thereof, which rightfully belong to the relator."

The plaintiff thereupon amended his complaint by substituting in place of said paragraph the following: —

"2. That the relator, John Boyer, at said election, as he is informed and believes, received a majority of all the legal votes cast, and was duly elected to the office of sheriff of Forsyth County for the said term of two years, but notwithstanding the relator received a majority of the votes cast by legally qualified voters of said county, a large number of votes were cast for the defendant, at the various precincts in said county, by persons who were not qualified voters in said respective voting precincts and townships, and were received and counted by the poll-holders. Some of said votes were cast by persons who were not residents of the townships and voting precincts wherein they voted; others by persons who were non-residents of the state; others by minors; others by persons disqualified by crime under the laws of the state; others who were not legally registered; a large majority of which illegal and fraudulent votes were cast in the Winston township, and those townships adjacent thereto. That the number of votes thus received and counted against the relator, as the relator is informed and believes, greatly outnumber the majority by which the defendant was declared by the canvassing board to have been elected."

After the amended complaint had been filed, his honor Judge Philips, presiding at that term, in the exercise of his discretion, denied the motion requiring the plaintiff to file a bill of particulars. The refusal of the court to compel the filing of a more specific statement of the grounds of relief asked by the relator gives rise to the first exception, and the second, third, and seventh involve substantially the same point.

A October term, 1889, before Hon. John A. Gilmer, judge presiding, the defendant submitted the following motion, in writing: "The defendant moves for specifications to be furnished by the plaintiff, to include the following points: "1. The names of alleged illegal voters relied upon by plaintiff to reduce the defendant's majority; 2. The precincts in which such alleged illegal votes were cast; 3. The specific act relied on by the plaintiff in each instance."

Thereupon his honor made the following order:—

“That the parties furnish to each other bills of particulars, giving the following notices: 1. The number of illegal votes cast, and for whom cast; 2. The grounds of illegality of each respective class of illegal votes; 3. When and where polled.”

The defendant excepted to the foregoing order, because it did not furnish the full relief demanded. (Error and exception No. 2.)

On the twenty-fifth day of November, 1889, the defendant served upon the plaintiff the following notice of motion:—

“*To the Plaintiff:* Take notice, that at the next special or regular term of said superior court to be held in said county, the defendant will move the court to require the plaintiff to further amend the complaint, as follows:—

“1. To allege, specifically and particularly, the ground of complaint against the validity of the election mentioned in the complaint, and against each voter.

“2. To state, particularly, the names and number of persons who, it is alleged, have been counted as voters, and who ought not to have been so counted.

“3. The specific act relied on by the plaintiff in each case, and the name of each voter to be attached, and the precinct in which he voted.

“Such motion will be made unless the plaintiff so amends the complaint, and files a copy in the office of the clerk of said court, or a copy thereof be served upon the defendant within twenty days after the service of this notice, or unless the information required by such amendments be furnished to the defendant, in writing, within said twenty days.”

A special term of the superior court of Forsyth County was appointed by Hon. Daniel G. Fowle, governor, to be held on the sixth day of January, 1890.

This case was called on Wednesday, the eighth day of January, during the said special term; whereupon the defendant, pursuant to the last-named notice, moved the court that the plaintiff be required to amend the complaint in accordance with the demand in said notice contained.

The motion of defendant was denied in the following terms: “The court having declined to grant defendant’s motion for an order to amend the complaint, the defendant prayed as appeal, and asked that the court stay the trial until said appeal be heard. Declined by the court. Exception by defendant.” (Error and exception.)

The general provision of the code (sec. 259) is, that "the court may, in all cases, order a bill of particulars of the claim of either party to be furnished." When a complaint contains a statement of facts that constitutes a cause of action, according to the established principles of law, the responsibility rests upon the trial judge, in the exercise of a sound discretion, to determine whether more specific and detailed statements of facts, when demanded by either of the parties to the action, should be required to prevent surprise, or prohibited to avoid confusion and prolixity in the trial: *Election Cases*, 65 Pa. St. 35; *Tilton v. Beecher*, 59 N. Y. 183; 17 Am. Rep. 337.

When, therefore, the relator alleged in his complaint that a sufficient number of illegal votes had been cast for the incumbent in Forsyth County, and counted for him in the computation upon which his *prima facie* right to the office depended, to change the result if the illegal voters had been denied the privilege of exercising the elective franchise, his statement, if proven, would have established his right to the judgment demanded: *Zerby v. Snare*, 107 Pa. St. 183; *State v. Mason*, 14 La. Ann. 505; *Halstead v. Rader*, 27 W. Va. 806. The corrective power of the presiding judge to set aside a verdict for surprise would have given the defendant additional security if it had actually appeared that he was misled in making his preparation to meet the testimony offered for the relator. We think that when Judge Gilmer required the relator to give the aggregate number of illegal votes alleged to have been cast for the defendant, the grounds upon which the charges of illegality were based as to each class, and when the votes were polled, the defendant could not claim, as of right, a fuller and more definite specification of what the relator expected to prove: *Brightley's Lead. Cas. Eq.* 334; *Wheat v. Roysdale*, 27 Ind. 201; *Garrett v. Higgins*, 27 Ind. 162.

In trying the title to an office which involves the preservation of the purity of elections and the protection of the popular right of suffrage, public policy and intrinsic justice alike forbid that a judge vested with important discretionary powers, should exercise them in such manner as to permit so grave a question to degenerate into a technical contest as to the correct spelling of the name of an obscure tramp with a convenient supply of *alias* surnames, or to allow an incumbent to enjoy the fruits of his fraudulent practices, because a relator could not induce an unwilling witness to disclose the true name of an individual who had been one of the instruments used in its

perpetration, until the information could be extracted from him on his examination under oath. It is sufficient, where there are no restrictive statutes changing the general principle, that the contestant for an office should notify the contestee, in his complaint, of the nature of the objections made to the validity of the election, and it then rests with the latter to show the court, on a motion to require more definite information, that he cannot prepare his defense without incurring unnecessary expense, or at all, if certain specifications of the contestant's ground should not be made: *Howard v. Shields*, 16 Ohio St. 184; *Griffin v. Wall*, 32 Ala. 150; *Hadley v. Gutridge*, 58 Ind. 302; *O'Gorman v. Richter*, 31 Minn. 25. We fail to find the rigid rule, that a contestant of an election in a notice on a pleading should be required to give the contestee the name of every alleged illegal voter as to whom he proposes to offer proof, approved in any of the states, and it seems now to be enforced only in obedience to the letter of a statute requiring it in some states, as in Missouri: *Kreitz v. Behrensmeyer*, 125 Ill. 141; 8 Am. St. Rep. 349. The question involved in the decision of *Rigsbee v. Durham*, 99 N. C. 341, was very different from that presented in this case. There the plaintiff alleged in general terms that a majority of the qualified voters did not vote for the school, and stated as a reason, that the defendant commissioners had improperly stricken from the registration-books the names of 180 voters; and if those names were restored, the number cast in favor of the school would not constitute a majority of the whole registration list. Evidence was heard upon an issue framed as to the legality of striking off said names (see p. 345), and the plaintiff submitted to judgment of nonsuit, because the court held that the testimony offered did not tend to show that any persons whose names were stricken off were legal voters. The judgment below was sustained in this court. It appears, therefore, that the judge in that case allowed an issue to be submitted upon a much more vague and indefinite statement than we have in the case before us.

The test laid down in *Skerritt's Case*, 2 Pars. Cas. 509, was, whether the facts set forth are such that, if true, it would be the duty of the court to vacate the election, or declare another person than the one returned to have been duly elected: McCrary on Elections, sec. 402. But it seems that the rule was relaxed by the supreme court of that state in later cases: *Election Cases*, 65 Pa. St. 35.

The code (secs. 1722-1730, both inclusive) prescribes the mode of selecting and drawing and the qualifications of jurors. Special provision is made in section 1731 for the drawing of jurors for special terms by the commissioners. But the sheriff is not required to act in any case, except where the commissioners neglect to draw the jury, and then the duty devolves (under section 1732) upon him, the clerk of the board of commissioners, and two justices of the peace. A special term of the court had been called when this case had been at issue for several terms, and perhaps with the trial of it particularly in view. We find the sheriff officiously taking charge of the drawing for that term, and receiving the scrolls as they were drawn by a boy, calling the name without submitting more than two or three to the inspection of any other person, and passing them into a locked box. It was the duty of the commissioners to supervise the taking out of the scrolls and depositing them in the other box. While his honor did not find, and had no means of knowing, that there was actual fraud on the part of the defendant, it is plain that, by his improper interference with the duties of others, he had the opportunity and the temptation to perpetrate a fraud upon the relator with but the remotest chance of detection. The fact that one name that ought to have been in box No. 2 was again found in No. 1 strongly suggests some irregularity or tampering with the names by some one. Challenges to the array are exceptions to the whole panel, and are generally founded on a charge of partiality or some default of the sheriff or other officer who summoned them: *State v. Murph*, Winst. 129; 3 Bla. Com. 359; Abbott's Law Dict., tit. Challenge. The action of his honor was founded upon the idea, not that there was, but that there might have been, fraud on the part of the defendant, and that the opportunity was afforded him by officiously intermeddling, when a man who had a proper sense of propriety, and wished to avoid the appearance of evil, would have refused, if requested, to take any part in the drawing.

When the array had been set aside, the defendant moved the court to have another jury drawn, under the provisions of section 1732, but, so soon as they were drawn, challenged the array, and the court set it aside also, on his motion. The judge then appointed one S., under the provisions of chapter 441, Laws of 1889, which authorizes the appointment of some suitable person by the judge to summon a jury from the by-

standers when the sheriff is a party or has an indirect interest in the action to be tried. The legislature has thus given its sanction to the idea that seemed to have operated upon the judge's mind in first discharging the whole panel.

But it is insisted that the summoning of jurors *de circumstantibus* is a mode of supplementing a jury insufficient in numbers to discharge the business, but that a court has no power, when all summoned as regular jurors under any other provision of the law have been discharged, to create the whole panel by an order for a special *venire*, unless some statute authorizes that course to be pursued. The direct provisions of the various statutes had been resorted to in vain to procure a jury of good and lawful men to try this cause.

Blackstone, in his Commentaries, says: "If, by means of challenges or other cause, a sufficient number of unexceptionable jurors doth not appear at the trial, either party may pray a tales. A tales is a supply of such men as are summoned on the first panel in order to make up the deficiency": 3 Bla. Com. 364. This rule was founded upon a construction given by the courts to the old English statutes in reference to a tales *de circumstantibus*. But our code, after giving in detail the methods of drawing jurors, provides, in section 1733, in order "that there may not be a defect of jurors, the sheriff shall, by order of the court, summon, from day to day, of the by-standers, other jurors, being freeholders within the county where the court is held, to serve on the petit jury, and on any day the court may discharge those who have served the preceding day," etc. If there is not an inherent power in a court, under the common law, to provide for the summoning of a *venire* in order to avoid a failure to administer the law where the officers, by their dereliction of duty, have failed to select a jury, or by their conduct have made it apparent that there was, or possibly that there might have been, fraud in the selection of the panel returned, the section of the code last cited (1733) was evidently intended to give the court, by necessary implication, the power to meet any such emergency, by requiring the sheriff (for whom the act of 1889 allows the court, in cases like this, to appoint a substitute) to summon freeholders of the county. Perhaps a different rule might prevail were a judge, through mere caprice, or upon insufficient grounds, to discharge the whole panel before ordering the summoning of tales jurors: Thompson and Merriam on Juries, sec. 81. But here the first panel was set aside for

reasons that we hold sufficient, and the second, on motion of the party who seeks to take advantage of the allowance of his own motion, to adjourn the court and hold the office of which he is the incumbent. The suggestion that the act of 1889 was passed after this action was brought, and that it would be unconstitutional to resort to its provisions in procuring a jury in the trial of pre-existing suits, is not supported by reason or authority. The legislature have the right to alter the remedy, provided it is not destroyed or impaired. The evident object in passing the act of 1889 was to prevent possible fraud on the part of a sheriff in the selection of jurors to try an action to which he is a party, or in which he has an interest.

The qualification of an elector under our constitution depends upon the questions whether he was born in the United States or has been naturalized, is twenty-one years old, has resided in the state twelve months, and in the county in which he proposes to vote ninety days, and shall have registered in the township or voting precinct in which he proposes to vote according to law: Const., art. 6, secs. 1, 2.

The person must have come into the state a year before the election, or have been domiciled within it for twelve months after forming the purpose to remain, in order to constitute him a resident, and the same intent must be concurrent with the actual occupation of a domicile in the county, in order to entitle him to the rights of an elector within its limits. The qualification of one who has a domicile in the state, except where the law makes certain acts conclusive evidence in determining where it is, must often depend solely upon the intent which is known only to him, or upon his age, which often cannot be actually ascertained except from family records, not accessible to others, or from his statements. The lives and fortunes of men are constantly made to depend upon their declarations, used as evidence of the existence of malice or of fraud, as motives controlling their conduct, and we see no sufficient reason why the declarations of a person, and such circumstantial evidence as tends to show his intent in so far as it is material in determining whether he is a qualified voter, should not be heard in the adjudication of his rights as an elector, or in passing upon an issue which involves the question whether he was a qualified voter. The declarations of a voter as to his qualifications, generally, if made at the time of voting, are competent as a part of the *res gestæ*, and if not contemporaneous, but made previously, are

admissible, if such declarations are in disparagement of his right as an elector, because they are against his interest, and he is considered as represented by the party for whom his suffrage was cast.

Taylor, in his work on evidence (vol. 1, sec. 686), says: "On this ground [because the declarant, though not a party, is interested in the subject-matter of the suit] it has been repeatedly held on the trial of election petitions that the declarations of voters against their own votes, whether made before or after the votes were given, and even though invalidating their own votes on the ground of their having received bribes, are admissible in evidence, for in a scrutiny each case is considered a separate cause, in which the supporter of the vote under discussion, and the voter, are parties on one side, and the opposers of the vote are the parties on the other."

The rule as stated generally, and as we think correctly, by the courts in this country, is, that after first showing that a person voted against a contestant, or offering testimony tending to show that he so voted, he is considered a party in interest as against the latter, and any declaration showing his want of qualification to vote, is admissible, like those of a party made against his own interest. But it is held by most of the courts in the United States that such declarations, when made some time after the vote has been cast, are not competent: *Beardstown v. Virginia*, 76 Ill. 84; 81 Ill. 541; *Abbott on Trial Evidence*, 750; *People v. Pease*, 27 N. Y. 45; 84 Am. Dec. 268 et seq., notes; *Paine on Elections*, sec. 773; *French v. Lighty*, 9 Ind. 478.

The eighth exception shows that the judge below was guided by the principles we have announced. It was as follows:—

"The plaintiff proved by a witness that Bethel Smith voted for the defendant at the election in November, 1888. Plaintiff then proved the declarations and acts of Bethel Smith, tending to prove that his vote was illegal, and that he was not a duly qualified voter, such acts and declarations being made at and before the time of voting. Objected to by the defendant. The court overruled the objection, and stated that it would admit the declarations of an alleged illegal voter made at the time or before voting, but that the plaintiff must prove, by other legal evidence, that such voter voted for the defendant, and the court would exclude any declarations

offered by the plaintiff, made by a voter after the election. Exception by defendant." (Error and exception No. 7.)

The ninth and tenth exceptions are substantially the same as the eighth. Counsel, in discussing these exceptions, frequently referred to the competency of declarations as to intent, bearing upon the question of domicile. Declarations accompanying and explaining any act tending to throw light upon the question where the domicile of the person making it was, and what his intent as to residence at a particular time when it was drawn in question, are admissible as explanatory of the act, and it is generally conceded now that where such declarations come within the rule already stated, as invalidating the right of an elector who makes them to vote, they are admissible, even if not contemporaneous with and explanatory of the act of voting, but made previously: 2 Wharton on Evidence, sec. 938; Jacob on Domicile, sec. 451; 1 Greenleaf on Evidence, sec. 108, and notes *a* and *c*; 1 Wharton on Evidence, secs. 258-268; Brightly on Elections, p. 113; Abbott on Trial Evidence, 107, and notes.

An honest elector who has observed the law enjoys the privilege, which is entirely a personal one, of refusing to disclose, even under oath as a witness, for whom he voted. This rule grows out of the secret-ballot system, generally adopted in this country for the protection of the voter and the preservation of purity and independence in the exercise of this most important franchise. If an illegal voter can claim the privilege at all, it is because he finds shelter under the very different principle that he cannot be compelled to criminate himself. As between contestants for office, however, the testimony of the elector, if pertinent and relevant, is always admissible. Neither contestant nor contestee is called upon to contend for the rights of a witness who does not demand protection; and if compelled to testify against his will, it does not follow that testimony, competent without objection on his part, should not go to the jury for what it may be worth: *People v. Pease*, 27 N. Y. 45; 84 Am. Dec. 268; McCrary on Elections, 457, 458, 459. It does not appear in fact that the witness Winchester made any objection whatever to answering the question. We are not to be understood as disapproving of the ruling of the judge upon the abstract question. It seems there are good reasons for sustaining the rule that the judge who tries a case may, in the exercise of his discretion, determine certainly, as between contestant and contestee, if there

is any evidence at all, how much testimony tending to show the illegality of a particular vote is sufficient as a foundation for compelling the voter to tell for whom he voted. The judge passes upon the preliminary evidence to show loss of papers or establish a conspiracy before admitting proof of contents in the one case, and declarations of alleged conspirators in the other, and his decision is not reviewable in the appellate court.

Where it does not appear from the direct testimony of the voter, or any other person, for what candidate he voted, there is no reason why circumstantial evidence should not be held competent as tending to establish the fact, leaving the court to pass upon its sufficiency at any stage of its development as a foundation for compelling him to testify, and allowing the jury to determine, upon all the evidence, in whose column of voters he should be counted. The fact that a certain person was engaged in handing out tickets for the defendant, Teague, and for no other person, and that he gave tickets to one Wicker, and "voted him," is competent, and tends to show for whom Wicker voted. The courts would not be capable of passing upon the relevancy of such circumstantial testimony, when offered, if they did not take notice of the not very commendable practice of supplying voters with tickets and leading them to the polls, which the witness described as "voting him." The guidance of reason and common sense must be ignored, as a basis of the rules of evidence, if Lowery's conduct were not held to be circumstantial testimony tending to show how Wicker voted: McCrary on Elections, sec. 458; Paine on Elections, sec. 768; 6 Am. & Eng. Ency. of Law, 430, and notes.

It was competent to show that a man who voted in Bethania township, in Forsyth County, under the name of Ed Conrad, had been a resident of Winston in the spring before the election, had been indicted under the name of Ed Jones, and had been convicted, and sentenced to imprisonment for ninety days; that he had escaped jail, and had not lived in Bethania township for two or three years before the election, but had lived in Winston township for that length of time.

The identity of the man being established, the record of his indictment and conviction was admissible, not to disqualify him for crime, but to prove the fraudulent voting. We think that a witness is competent to testify to a fact of the truth of which he says that he feels "reasonably certain." That was the best impression of an eye-witness, and it was not

necessary that his recollection should be so vivid as to exclude all doubt: 1 Greenl. Ev. 440.

Exceptions 15 and 16.— Exceptions numbered 15 and 16 are stated in the record as follows:—

The defendant next proceeded to prove by Robert Hall and John Watkins, and also by fifty other witnesses, that they were present at the election at Winston precinct, and were duly registered; that they were in the line of voters, and tendered ballots with the name of Milton E. Teague thereon, for sheriff, to the judges of election; that these votes were challenged by challengers at the polls; that the chief of police, Maroney, when they were challenged, told them to go and get their witnesses, and return at two o'clock, the time appointed to hear challenges; that said Maroney was in charge of the depositions to preserve order, by authority of all the judges of election; that said voters returned at two o'clock, but, owing to the large number of voters, said voters had no opportunity during the day to have their challenges tried, and were thereby prevented from casting their votes, and were left in the line when the polls closed.

The court stated that it would exclude testimony as to how the voter, or witness, offered to vote, unless he actually voted. Defendant excepted. (Error and exception No. 15.)

The defendant then stated, under the ruling of the court, that he would not actually offer such testimony; but it is considered by the court as offered. The defendant excepted to the ruling. (Error and exception No. 16.)

Judge Cooley says (Constitutional Limitations, 620, 621): "So it is held that an exclusion of legal votes—not fraudulently, but through error in judgment—will not defeat an election, notwithstanding the error in such case is one which there was no mode of correcting, even by the aid of the courts, since it cannot be known with certainty afterwards how the excluded electors would have voted, and it would obviously be dangerous to receive and rely upon their subsequent statements as to their intentions, after it is ascertained precisely what effect their votes would have upon the result": *Hartt v. Harvey*, 19 How. Pr. 252; *Webster v. Byrnes*, 34 Cal. 273; *State v. Judge*, 13 Ala. 805; *Kriets v. Behrensmeyer*, 125 Ill. 141; 8 Am. St. Rep. 349. The law, as stated by Judge Cooley, seems to be in accord with the decisions of the American courts. Some of our legislative bodies, possibly in the heat of partisan excitement, have acted upon a different prin-

ciple. We are the better satisfied as to the propriety and justice of applying the rule in this case from a review of the other testimony, as it appears in the following extract taken from the case on appeal.

Prior to the introduction of Robert Hall and John Watkins, the defendant had introduced H. X. Dwire, who testified as follows:—

That he and J. S. White were the Republican judges of election at the Winston box, and C. A. Hall and B. J. Shepherd were the Democratic judges; that the polls were opened promptly at seven o'clock in the morning, and voting immediately began; that the votes were received and deposited as rapidly as possible from that time until sunset, without intermission for dinner; that for an hour or two in the morning they tried each challenge as it was made by the respective sides; that the judges, upon consultation, unanimously decided that it was better to stand aside the challenged voters, and notified them to return at two o'clock with their witnesses, rather than to delay the whole line to send for witnesses; that under their direction, the chief of police instructed the challenged voters, when challenged, to pass out, and return with their witnesses, as aforesaid; that it was apparent, from the largely increased registration, unless this was done, that a large number of the qualified voters would not have time to vote, and this was done solely to expedite the voting, and as soon as the challenged voters returned with their witnesses their cases were heard as rapidly as possible, and that there were a number of voters in line when the polls closed, and that there were 1,206 votes cast in the Winston precinct where all this occurred.

The defendant requested the judge to instruct the jury that there was not sufficient testimony to justify them in finding that certain persons mentioned in the prayer were illegal voters. The charge of the court upon this point was as follows:—

"The request is made by the defendant that the court charge you that there is no evidence, or not sufficient evidence, to warrant you in deducting from Teague's column the votes of Thomas Hanes, Frank Fowler, Thomas Lee, George Foy, N. L. Young, Ed Davis, Charles Yokely, Creed Hairston, James Brown, Bob Moore, and William Holmes.

"Where there is no evidence tending to prove an issue, it is generally the duty of the court so to declare; but a separate

issue has not been framed or submitted as to each vote. The evidence as to each vote is simply so much evidence bearing upon the only two issues submitted to you. The plaintiff insists that there is evidence to show said votes illegal. The court declines to charge you that there is or is not evidence showing the illegality of the above-named votes. Your combined recollections are better than the court's. You have taken, the court is happy to observe, very copious notes of the testimony, and the court leaves it to you to determine whether there is any evidence, and if so, whether it is sufficient to convince you by a clear preponderance that the above-named votes are illegal, bearing in mind all the rules of law laid down by the court."

The refusal to give the instruction asked, and the substitution of the foregoing, were assigned as error in the twenty-second and twenty-third exceptions.

The testimony that the voter Hanes got his tickets at a table where "Teague tickets" only were distributed, and from the known agent of the defendant, Teague, and "came down the line within the ropes, and voted," was sufficient to be submitted to the jury as evidence that he voted for the defendant. The reasons and authorities upon which we reach this conclusion have already been given in the discussion of the exception growing out of the testimony of Winchester.

Thomas Lee, another of the eleven mentioned in the prayer for instruction, told John G. Young, the registrar, when first examined, that he was born in October, 1868, and was therefore only twenty years old. It is true that a person unknown to the registrar came back with Lee and swore that he was twenty-one years old. We think that his statement as to the time of his birth was just such a declaration as we have already held in this case to be admissible as to age. Bob Moore and William Holmes, if the testimony of the witnesses as to their respective declarations is to be believed, were residents, the one of Stokes and the other of Rowan County.

The testimony of N. L. Young and that of Giles Bason are conflicting as to the time when the former came to Winston. According to his own testimony, he had no settled home from the time he came from South Carolina, in 1885, till his wife died in South Carolina, in January, 1887. He testifies that he came to Winston to live in January, 1887, and also to what is inconsistent with that statement, that he came to Winston on a visit in the summer of 1887, when the other witness says

he first removed to that place in the summer of 1888, after electioneering commenced. If Young, being a resident of South Carolina, came to North Carolina and "pastored around" (to use his own expression), revisiting his old home occasionally, and having, as described, no "settled home," which we construe to mean no fixed purpose of remaining at any place to which he went, till he "came to Winston to live," then until that time he was not a resident of any county in North Carolina, nor a qualified voter, until he had remained within the state twelve months after coming *animo manendi*.

Having instructed the jury very fully, clearly, and correctly as to what were the qualifications essential to confer the right of suffrage, we think that the judge properly left the jury to determine, in view of the fact that Young had contradicted himself in a material portion of his testimony, and was also contradicted by another witness, whether he was a qualified voter under the rules laid down by him.

There was testimony tending directly to show that Ed Davis resided in Danville, Virginia, until June, 1888, after which time he could not have acquired the right of a citizen to vote by residence in this state.

Creed Hairston's testimony tended to show that he was a resident of Stokes County, and William Reynolds stated explicitly that Hairston lived in Stokes County. The testimony of the witnesses Charles and Bodenheimer, if believed, would establish the fact that Charles Yokely had resided in Forsyth County only about one month before the election.

Mr. Bessent, the tax collector in Winston, who made it his business to look up every resident of Winston, testifies that Frank Fowler was never there till a few months before the election, and never paid tax there; that the witness saw him buy a ticket for Clarksville, Virginia, on the day following the election, and that he had never been at Winston since. We think that this testimony was properly submitted to the jury, to determine whether the voter was qualified under the general instruction given by the court. The jury were allowed, properly, to say whether George Foy was a resident of Forsyth County. He left the home of his parents, in Rockingham, where he had certainly become a resident, every summer, to work in the tobacco factories, and left when the season was over. The fact that he stated that he considered Winston his home did not settle the question of law. The jury were at liberty to conclude from his own statement that

he had never abandoned, at any time, the idea of returning to his father's house when the season was over, and had never lost his right to vote in Rockingham County.

James Brown was challenged as a non-resident by Dr. Kerner, and then admitted that he came originally from Virginia, leaving his wife there, but, in order to fix his residence in North Carolina, went off and returned with a letter postmarked "Kernersville," where he was then proposing to vote, and purporting to announce that his wife was dead and another person in jail, and he could come home. Dr. Kerner testified that he had practiced medicine in Kernersville township for forty years, and had never seen Brown till he came to the polls, and had never seen him since. It is true that another witness testified that Brown had been a resident of the township for many years, but was then working on a railroad in the eastern part of the state; but his evidence, if Dr. Kerner was believed, was in direct conflict with Brown's own statement and letter. It was proper that the jury should have been left to settle the question of Brown's eligibility as an elector under the law as explained to them.

It is in vain to attempt to protect any community, where there is a demand for laborers in manufacturing establishments, on railroads in process of construction, and where an increased number are needed in the fall season, when the crops are being gathered, against an influx of tramps imported in the excitement of a canvass for office, unless juries are allowed to consider every circumstance that tends to show fraudulent practices by which residents of other counties or states, or residents of this state who have not yet acquired the elective franchise, are allowed to defeat the will of a majority of the qualified voters, just as it is competent to admit every circumstance tending to prove or disprove the allegation that the execution of a deed was procured by fraud. The presumption is in favor of the validity of a deed executed with all of the forms of law, but it can be rebutted by proving fraud to the satisfaction of a jury. So when an elector is allowed to deposit his ballot, the burden is on one who questions its validity to show, by a preponderance of testimony, the truth of such facts or circumstances as are relied upon to establish the disqualification. His honor's instruction was, in this respect, therefore, correct.

The charge given upon this subject was properly substituted

for that asked, and upon the refusal to give which exception 19 is based.

The defendant does not contend that the court could not proceed to judgment upon the issues submitted and the responses to them; nor is it insisted that the defendant has lost the opportunity, on account of the form of the issues, to present to the court below, and on appeal for review here, any view of the law applicable to the evidence. Subject to these two objections, the form and number of the issues that arise out of the pleadings must be determined by the judge who tries the case, in the exercise of a sound discretion: *Emry v. Raleigh etc. R. R. Co.*, 102 N. C. 224; *McAdoo v. Richmond etc. R. R. Co.*, 105 N. C. 140.

We think that the judge correctly interpreted and explained the law requiring a voter to procure a certificate when he removes from one township to another. The constitution (art. 6, sec. 2) contemplated the enactment of registration laws, passed with a view to prevent fraud, and the disqualification of even *bona fide* residents or citizens who refuse or neglect to comply with reasonable requirements intended for the purpose mentioned.

We concur with the court below in the construction given to the registration law, that any registration that takes place on the day of election is invalid and illegal, unless the voter becomes of age on that day, or shows the judges of election that, for any other good reason (as to which the judges of election are to determine), he has become entitled to vote.

If the registrar receives a certificate of removal outside of the township for which he is acting, administers the proper oath to the voter, and enters his name on the registration-book after his return home, though he did not have the said book with him, the registration is valid. His honor did not err in instructing the jury that such was the proper construction of section 2681 of the code.

We do not deem it necessary to discuss at length the instruction that gave rise to exception No. 31. It needs no argument, in view of the interpretation we have given to the constitution (art. 6, secs. 1, 2), and the registration laws, enacted in pursuance of its provisions, to prove that one whose true residence is in one township is not a qualified voter of another, where, after escaping from prison, he is hiding as a fugitive from justice.

There is abundant evidence of patience, fairness, learning,

and ability in the conduct of the trial and exposition of the law by the judge below, and upon a careful review of all the exceptions to his rulings and his charge, we find no error of which the defendant can justly complain.

Judgment affirmed.

JURY — CHALLENGE TO THE ARRAY. — The fact that a sheriff who returns the jury is a brother of one of the parties is a good cause to challenge the array: *Munshower v. Patton*, 10 Serg. & R. 334; 13 Am. Dec. 678.

ELECTIONS — QUALIFICATIONS OF VOTERS. — As to the nature of the oath of allegiance and the manner of making a declaration of intention to become a citizen, see *Andres v. Circuit Judge*, 77 Mich. 86. The qualifications of school electors are not identical with those of ordinary electors under the constitution: *Belles v. Burr*, 76 Mich. 1. But no provisions being made for allowing women to vote for school officers only at elections where school and other officers are to be elected, their right to vote cannot be exercised, even though at elections for school officers alone they might vote: *Gilkey v. McKinley*, 75 Mich. 543. Every citizen of a county need not necessarily be an elector, but every elector must be a citizen of the county in which he resides and seeks to vote: *Andrews v. Probate Judge*, 74 Mich. 278. A residence of twelve months in the state and six months in the county is necessary to entitle one to vote for county officers in Texas: *Little v. State*, 75 Tex. 617. For a discussion of the qualifications necessary to make one a voter according to law, see *Kellogg v. Hickman*, 12 Col. 257; *Kreits v. Behrensmeier*, 125 Ill. 141; 8 Am. St. Rep. 349, and note. Temporary absence will not disqualify a voter on the ground of a change of domicile: *Davis v. State*, 75 Tex. 421. Declarations of a voter, made subsequent to the election, are not competent to prove him disqualified as an elector in such election: *Kreits v. Behrensmeier*, 125 Ill. 141; 8 Am. St. Rep. 349; *Davis v. State*, 75 Tex. 421.

ELECTIONS — EVIDENCE TO SHOW FOR WHOM A BALLOT WAS CAST. — The ballots themselves constitute the best evidence of the intention of those who cast them: *Andrews v. Probate Judge*, 74 Mich. 278; *Gibson v. Supervisors*, 80 Cal. 359; *Dixon v. Orr*, 49 Ark. 238; 4 Am. St. Rep. 42; *Hartman v. Young*, 17 Or. 150; 11 Am. St. Rep. 787, and extended note 798-800. A ballot must be interpreted according to the ordinary rules which apply to the construction of written instruments: *Davis v. State*, 75 Tex. 421. Compare *Brown v. McCollum*, 76 Iowa, 479; 14 Am. St. Rep. 228, and particularly cases cited in note. Where the names of both candidates were printed upon the ballot, and across and above the upper name a pencil-mark was drawn, erasing the first initial of the name and touching the next, the pencil-mark was considered as having erased the upper name: *Davis v. State*, 75 Tex. 421. Electors may testify as to whom they voted for, but cannot be compelled to do so if they insist upon their privilege of the secrecy of the ballot: *Dixon v. Orr*, 49 Ark. 238; 4 Am. St. Rep. 42, and note. But the secrecy of the ballot is for the lawful voter merely, and an illegal voter may be required to disclose for whom he voted: *State v. Kraft*, 18 Or. 551.

ELECTIONS, BURDEN OF PROOF IN CONTESTS OF. — The contestant must show not only that the votes were illegal, but also that they were cast for the contestee: *Russell v. McDowell*, 83 Cal. 70. A ballot is ordinarily presumed to be legal and to have been legally cast: *Gunn v. Hubbard*, 97 Mo. 311; 10 Am. St. Rep. 312. The burden of proof is upon the contestant to show that

the ballots in evidence are the identical ones cast at the election: *Fenton v. Scott*, 17 Or. 189; 11 Am. St. Rep. 801, and note. Where fraud is practiced at a particular precinct, the entire vote of such precinct may be rejected; but while the legal votes cast are not invalidated by the fraud, the burden is upon him claiming them to prove them: *Lloyd v. Sullivan*, 9 Mont. 578.

ELECTIONS — REGISTRATION OF VOTERS. — Registration is essential to a citizen's exercise of his right to vote, and possessing the other legal qualifications, registration duly made is *prima facie* evidence of his electoral right: *Hampton v. Waldrop*, 104 N. C. 453. It is not sufficient reason to deprive a qualified voter of his vote that another has been registered who ought not to have been, and has no right to vote: *De Berry v. Nicholson*, 102 N. C. 465; 11 Am. St. Rep. 767, and note as to the effect of the registration law upon the qualifications of electors. A failure to comply with the registration law invalidates an election: *State v. Harrison*, 98 Mo. 423.

ELECTIONS, COMPLAINT IN CONTESTS OF. — A complaint in an election contest is sufficient in substance if it follows the statute prescribing what its contents shall be: *Burks v. Perry*, 26 Neb. 414; and it need not show the names of the persons whose ballots are alleged to have been improperly counted; *Kreitz v. Behrensmeyer*, 125 Ill. 141; 8 Am. St. Rep. 349. Persons having interests adverse to the contestant must be made parties to the contest: *Burks v. Perry*, 26 Neb. 415. The complaint should be filed at the first term of court next after the election, in an adjoining circuit, where the contest is of an election of a circuit judge; but it may be presented to the judge of such circuit in vacation: *Higbee v. Ellison*, 92 Mo. 13.

STATE v. DOWELL.

[106 NORTH CAROLINA, 722.]

CRIMINAL LAW — HUSBAND'S ATTEMPT TO COMMIT RAPE ON HIS WIFE. —

A husband who, under menace of death to both parties in case of refusal, and by presenting a loaded gun at both parties, constrains his wife to submit and a man to undertake an attempted sexual connection, is guilty of an attempt to commit rape.

INDICTMENT for an assault, with intent to commit rape.

Theodore F. Davidson, attorney-general, for the state.

SHEPHERD, J. Ordinarily, precedent is grateful to the judicial mind, as something approved and steadfast on which it may rest with confidence; but sometimes cases arise of such exceptional enormity that, for the fair name of humanity, the judge would hope to find no counterpart in criminal annals. We incline to believe that the case under consideration is one of such bad eminence. Unmatched in iniquity as it appears to be, it is hoped, however, that the application of a few elementary principles will harmonize the conclusion to which we have arrived, not only with our moral conceptions of what

should be the law, but also with its strict formal administration.

The facts are abhorrently simple. The white husband of a white wife, under menace of death to both parties in case of refusal, and supporting his threat by a loaded gun held over the parties, constrains a colored man to undertake and his wife to submit to an attempted sexual connection. The details of this shocking transaction are so disgusting that we will not stain the pages of our reports with their particular recital. Suffice it to say that, under the coercion of the defendant, Lowery, the colored man, did actually make the attempt. Indeed, he did everything necessary to constitute the crime of rape, except actual penetration. Fortunately, the fright and excitement rendered him incapable of consummating the outrage, which, as we understand the case, he would otherwise have perpetrated; and alike fortunately, at perhaps the critical moment, the gun discharging itself in the hands of the unnatural husband, the enforced assailant was enabled to effect his escape.

Under the laws of this state, the offense of an assault with intent to commit rape, although subject to very severe punishment, is technically a misdemeanor, and there being no degrees in this class of crimes, it must follow that if the defendant is guilty at all, he must be guilty as a principal. The defendant strangely insists that he is not guilty, because he is the husband of the prosecutrix, and he relies, as a defense, upon the marital relations, the duties and obligations of which he has, by all the laws of God and man, so brutally violated.

In our opinion, in respect to this offense, he stands upon the same footing as a stranger, and his guilt is to be determined in that light alone. The person of every one is, as a rule, jealously guarded by the law from any involuntary contact, however slight, on the part of another. The exceptions, as in the case of a parent, or one *in loco parentis*; moderately chastising a child (*State v. Harris*, 68 N. C. 1), or a schoolmaster a pupil (*State v. Pendergrass*, 2 Dev. & B. 365; 31 Am. Dec. 416; and *Boyd v. State*, 88 Ala. 169; 16 Am. St. Rep. 31), are strict and rare. It was at one time held in our state that the relation of husband and wife gave the former immunity, to the extent that the courts would not go behind the domestic curtain and scrutinize too nicely every family disturbance, even though amounting to an assault: *State v. Rhodes*, Phill. (N. C.) 453; 98 Am. Dec. 78. But since *State v. Oliver*, 70 N. C.

60, and subsequent cases, we have refused "the blanket of the dark" to these outrages on female weakness and defenselessness. So it is now settled that, technically, a husband cannot commit even a slight assault upon his wife, and that her person is as sacred from his violence as from that of any other person. It is true that he may enforce sexual connection, and, in the exercise of this marital right, it is held that he cannot be guilty of the offense of rape. But it is too plain for argument that this privilege is a personal one only. Hence if, as in *Lord Audley's Case*, 3 How. St. Tr., the husband aids and abets another to ravish his wife, he may be convicted as if he were a stranger. The principle is thus tersely expressed by Sir Matthew Hale: "For though in marriage she hath given up her body to her husband, she is not to be by him prostituted to another": Hale P. C. 629; 2 Bishop on Criminal Law, 1135; 3 How. St. Tr. 401.

It thus appearing, we think, beyond all question, that the defendant in this indictment is to be regarded as a stranger, we will further consider the case in that aspect alone.

It is contended that as Lowery acted under coercion, and was for that reason excusable, there was no intent to commit rape, and therefore the defendant cannot be convicted. It will be observed that the intent of Lowery to commit the offense is not determined alone by the presumption that every one is presumed to intend the natural consequences of his act; but he testifies that he did actually attempt to have sexual connection. Here, then, we have a specific, actual intent to commit the foul deed, and can it be that he who constrains the will of another to commit such a crime is to be permitted to shield himself upon the ground that there was an entire absence of criminal intent? If this be true, then one who coerces another to shoot down a third person in cold blood is not guilty of murder, because there is no intent for which the person doing the shooting is criminally responsible. The law, in such a case, couples the act of the instrument with the intent of the instigator, and in this way he is held guilty of murder. And this is true, also, where the instrument is under the age of seven, and conclusively presumed to be incapable of having any criminal intent. So, too, if one is indicted under our statute for shooting at a railroad train, with intent to injure it, and it appears that he coerced another to do the shooting, can it with reason be said that he is not guilty because his instrument did not have an intent to inflict

any injury? These and other examples which we could cite from our reports well illustrate the principle upon which our case depends, and especially is this so when, as we have said, the specific intent is expressly shown by the testimony. We are clearly of the opinion that the unlawful act committed in pursuance of the combined intents of the defendant and his enforced instrument are amply sufficient to sustain the conviction.

While placing our decision upon this ground, we are not prepared to say that, under the circumstances, Lowery would have been excusable had he completed the offense. We leave this an open question, remarking, however, that the *tabula in naufragio* of Lord Bacon has been well-nigh submerged by judicial and critical casuists: See Wharton on Criminal Evidence, secs. 560, 561, and notes to second edition; *United States v. Holmes*, 1 Wall. Jr. 1; see also Coleridge, C. J., in the case of *The Migniotte*, decided in 1884. But mark the diversity. There the displaced struggler for life was, by clinging to the plank, insufficient for two, as much attacking his companion in shipwreck as if he were firing at him with a pistol. In our case, the victim is entirely innocent, in no way threatening, by her act or deed, any harm to the attempted ravisher. In this view of the case, let us briefly refer to the authorities.

In Broom's Legal Maxims, 17, 18, it is said: "In accordance with the legal principle, *necessitas inducit privilegium*, the law excuses the commission of an act *prima facie* criminal, if such act be done involuntarily, and under circumstances which show that the individual doing it was not really a free agent. Thus if A, by force, takes the hand of B, in which is a weapon, and therewith kills C, A is guilty of murder, but B is excused; though if merely moral force be used, as threats, duress of imprisonment, or even an assault, to the peril of his life, in order to compel him to kill C, this is no legal excuse." For this is cited 1 Hale P. C. 434, which seems to be entirely in point. East, in his Pleas of the Crown (vol. 1, p. 294), undertakes to argue that "if the commission of treason may be extenuated by the fear of present death, there seems to be no reason why homicides (or any of the other capital offenses, of course) may not also be mitigated upon the like considerations of human infirmity": Bishop on Criminal Law, 348. To this, however, an answer is found in 4 Blackstone, 30, where he says: "In time of war or rebellion, a man may be justified in doing many treasonable acts by compulsion of the enemy,

or rebels, which would admit of no excuse in the time of peace. This, however, seems only, or at least principally, to hold as to positive crimes so created by the laws of society, and which, therefore, society may excuse, but not as to natural offenses so declared by the law of God. . . . And therefore, though a man may be violently assaulted, and hath no other possible means of escaping death but by killing an innocent person, this fear and force shall not acquit him of murder; for he ought rather to die himself than escape by the murder of an innocent." If this be so, and the crime of rape is considered so heinous as to be punishable in the same way as murder, it would seem that "human infirmity" ought not to be tolerated by our laws to the extent of excluding one for the violation of female virtue on the plea of danger to himself, however great or imminent. For the reasons first stated, we think that the ruling of his honor was correct, and that there is no error.

MERRIMON, C. J., dissented, and expressed as his opinion that, in the nature of the marriage relation, the husband himself cannot commit rape, nor an assault with intent to commit rape, upon his wife. He can commit either of the crimes against his wife by procuring, aiding, abetting, or encouraging another to commit them, or either of them, and his guilt, in such case, depends entirely upon the perpetration of the offense by a third party. In the present case, there was no intent on the part of the third party to commit either of these crimes, and such intent was an essential element of the crime, and for this reason the husband is not guilty of the crime charged in the indictment. He is, however, chargeable with having committed an assault with a deadly weapon, and with intent to kill, both upon his wife and the third person. It is urged that the punishment for the last-named crime is not adequate; but that is no argument. The courts have nothing to do with the punishment of criminals further than to impose the punishment for the crime as fixed and imposed by law.

RAPE — A husband may be accessory to the crime of rape upon his own wife: *Note to Smith v. State*, 80 Am. Dec. 263; *People v. Chapman*, 62 Mich. 280; 4 Am. St. Rep. 857.

STATE v. STEELE.

[106 NORTH CAROLINA, 766.]

INNKEEPERS — RIGHT TO EXCLUDE DRUMMERS. — An innkeeper need not admit and has power to prohibit the entrance of any person or class of persons into his house for the purpose of plying his guests with solicitations for patronage in their business; and the guest has a positive right to demand of the host such protection as will exempt him from annoyance by persons who intrude upon him, without invitation and without welcome, to subject him to torture by a display of their goods, or a recommendation of their nostrums or business.

INNKEEPERS. — GUESTS OF A HOTEL, AND TRAVELERS OR OTHER PERSONS entering it with the *bona fide* intent of becoming guests, cannot be lawfully prevented from going in, or be put out by force after entrance, provided they are able to pay the charges, and tender them if requested by the landlord, unless they are persons of bad or suspicious character, vulgar habits, or so objectionable to patrons of the house, on account of race, that it would injure the business to admit them to all portions of the hotel, or unless they attempt to take advantage of the freedom thereof to injure the landlord's chances of profit derived either from his inn, or any other business incidental to or connected with its management, and constituting a part of the provision for the wants or pleasure of his patrons.

INNKEEPERS — WHO MAY BE EXCLUDED FROM HOTEL. — When persons, unobjectionable on account of character or race, enter a hotel, not as guests, but intent on pleasure or profit, to be derived from intercourse with its inmates, they are there, not of right, but under an implied license, that may be revoked at any time by the innkeeper, who may expel, without unnecessary force, all who have not acquired rights growing out of the relation of guest, and must expel all who, by their conduct, create a nuisance, and prove an annoyance to his patrons.

INNKEEPERS. — REGULATION, made by an innkeeper, that proprietors of livery-stables, and their agents or servants, shall not be allowed to enter his hotel for the purpose of soliciting patronage for their business from his guests, is a reasonable one; and after notice to desist, a person violating it may be lawfully expelled from the house, if excessive force is not used in ejecting him.

INNKEEPER MAY ESTABLISH LIVERY-STABLE, NEWS-STAND, BARBER-SHOP, OR LAUNDRY in connection with his hotel, and exclude all who come soliciting such business; or he may contract with the proprietor of a livery-stable in the vicinity to secure for the latter, so far as he legitimately can, the patronage of his guests in that line for a per centum of the proceeds derived from such business with the patrons of his house. He may then make, and after personal notice to violators enforce, a rule excluding from his hotel the agents and representatives of other livery-stables who enter to solicit the patronage of his guests; and where one has persisted in visiting the hotel for that purpose, after notice to desist, he may use sufficient force to expel him, upon his refusal to leave, and may eject him, even though on a particular occasion he may have entered for a lawful purpose, if he does not disclose it when requested to leave, and has in fact been soliciting the patronage of guests.

INNKEEPER — RIGHT TO EJECT PARTY NOT GUEST. — An innkeeper has a right to request a party who visits his inn, not as a guest or on business

with guests, to depart, and if he refuses, the innkeeper may gently lay his hands upon him to lead him out, and if he resists, employ sufficient force to eject him. For so doing he can justify on a prosecution for assault and battery.

INNKEEPERS — RIGHT TO DISCRIMINATE AGAINST DRUMMERS. — An innkeeper may make a valid contract for a valuable consideration with a certain livery-stable keeper, and give him the exclusive right to remain in the hotel and solicit patronage from the guests, and such innkeeper may expel, without unnecessary force, the agent of a rival stable, who, after notice to desist, persists in soliciting patronage from the guests; nor is his right to expel such agent forfeited by failing to order the agent of another stable out of the hotel, when found soliciting patronage therein after having received notice to desist.

INNKEEPERS — REGULATION ADOPTED BY AN INNKEEPER that "no livery-man or agent of any transportation or baggage company, no washer-woman or sewing-woman not connected with the house, or loafer or loungee or objectionable person, will be allowed in the hotel," is reasonable and valid.

ASSAULT. Joseph Weaver, the prosecuting witness, testified that a Mr. Dawson, a guest at defendant's hotel, called him to supply horses from a livery-stable for which he was agent. Witness went to the porch of the hotel. When defendant asked him to get off, he replied "all right," and started to get off, when defendant pushed him, and, to prevent injury to himself, he caught the railing. Witness did not know whether defendant knew that he was soliciting for a livery-stable or not, but defendant had previously notified him not to go on the grounds of the hotel, and had told him that when he had livery business to transact with guests of the hotel to go to the back part thereof, to a place designated for his business. He had been notified by defendant to keep off the porch of the hotel, where he was standing at the time of the alleged assault. The defendant introduced the following rule and regulation of his hotel, which had been approved by the municipal authorities: "No livery-man or agent of any transportation or baggage company, no washer-woman or sewing-woman not connected with the house, or loafer or loungee or objectionable person, will be allowed in the hotel." He then testified that he was manager of the hotel in question, and that the prosecuting witness, on the day of the alleged assault, was on the porch of his hotel; that he told him to go away and stay at the place designated for livery-men; that he did not go, when witness put his hands gently upon him, using no more force than was necessary to remove him from the porch; that witness kept two persons employed whose business it was to receive orders from guests to livery-

men, and that it was their duty to transact business at the place designated, back of the hotel; that the prosecuting witness knew of this, as well as of the other rules of the hotel, and was on the porch in violation thereof; that he was often there creating disturbances, and committing a nuisance after being warned not to come there. Witness also testified that he had, some time before, made a contract with one Sevier to do the livery business for the hotel, and was to receive ten per cent from him of the proceeds of such business. Witness was corroborated in his testimony by that of other witnesses. E. C. Chambers testified that he was a livery-stable keeper, and had received the same notice to desist from soliciting patronage at the hotel as that received by the prosecuting witness, but, nevertheless, has continued so to solicit, and had not been ejected from the hotel, or ordered to leave. Verdict of guilty, and defendant appealed.

D. Schenck, H. A. Gudger, J. B. Batchelor, and John Devereux, Jr., for the appellant.

Theodore F. Davidson, attorney-general, and G. A. Shuford, for the state.

AVEY, J. It was formerly held by the courts of England that where an innkeeper allured travelers to his tavern by holding himself out to the public as ready to entertain them, and then refused to receive them into his house when he had room to accommodate them, and after they had tendered the money to pay their bills, he was liable to indictment. But this doctrine, says Bishop, has little practical effect at this time, being rather a relic of the past than a living thing of the present: 1 Bishop on Criminal Law, sec. 532; *Rex v. Lewellyn*, 12 Mod. Rep. 445. In a *dictum* in *State v. Mathews*, 2 Dev. & B. 424, this old principle was stated with some qualification, viz., "that all and every one of the citizens have a right to demand entertainment of a public innkeeper, if they behave themselves and are willing and able to pay for their fare; and as all have a right to go there and be entertained, they are not to be annoyed there by disorder, and if the innkeeper permits it, he is subject to be indicted for a nuisance": *Rommel v. Schambacher*, 120 Pa. St. 579; 6 Am. St. Rep. 732. The duty and legal obligation resting upon the landlord is to admit only such guests as demand accommodation, and he has the right to refuse to allow even travelers who are manifestly so filthy, drunken, or profane as to prove disagreeable to others who are

inmates, and thereby to injure the reputation of his house, to enter his inn for food or shelter, though they may be abundantly able to pay his charges: 2 Wharton on Criminal Law, sec. 1587; *Regius v. Rymer*, 13 Cox C. C. 378. The right to demand admission to the hotel is confined to persons who sustain the relation of guests, and does not extend to every individual who invades the premises, not in response to the invitation given by the keeper to the public, but in order to gratify his curiosity by seeing, or his cupidity by trading with, patrons who are under the protection of the proprietor: Wharton on Criminal Law, sec. 625. The landlord is not only under no obligation to admit but he has the power to prohibit the entrance of any person or class of persons into his house for the purpose of plying his guests with solicitations for patronage in their business; and especially is this true when the very nature of the business is such that human experience would lead us to expect the competing drummers, in the heat of excitement, not only to trouble the guests by earnest and continued approaches, but by their noise, or even strife. The guest has a positive right to demand of the host such protection as will exempt him from annoyance by persons who intrude upon him, without invitation and without welcome, and subject him to torture by a display of their wares or books, or a recommendation of their nostrums or business.

That learned and accomplished jurist Chief Justice Shaw, delivering the opinion in *Commonwealth v. Power*, 7 Met. 600, 41 Am. Dec. 465, said: "An owner of a steamboat or railroad, in this respect, is in a condition somewhat similar to that of an innkeeper, whose premises are open to all guests; yet he is not only empowered, but he is bound, so to regulate his house as well with regard to the peace and comfort of his guests who there seek repose as to the peace and quiet of the vicinity, and to repress and prohibit all disorderly conduct therein; and of course he has a right and is bound to exclude from his premises all disorderly persons and all persons not conforming to regulations necessary and proper to secure such quiet and good order." This principle was stated as an established one, and used by the court as an argument to sustain, by analogy, its ruling, announced in a subsequent portion of the opinion, that a railroad company had a right, by its regulations, to exclude from its depot and cars, at any station, persons who visited them for the purpose of soliciting passengers to stop at particular hotels; and one of the reasons given for holding the

regulation reasonable was, that where the agents urged the claims of their respective hotels "with earnestness and importunity, it was an annoyance to passengers." The doctrine is there laid down, too, that persons other than passengers *prima facie* have the right to enter the depot of a railroad company, as others besides guests may go into hotels without making themselves trespassers, because, in both instances, there is an implied license given to the public to enter; but such licenses, in their nature, are revocable, except in the one case as to passengers, and in the other as to guests, who have the right to enter the train, ticket-office, or hotel, as the case may be, if they are sober, orderly, and able to pay for transportation or fare. The court went further in that case, and held that in enforcing the reasonable regulation against drummers for hotels at the depot, the servants of the railway company were not guilty of an assault for expelling by force, not excessive, a person who had repeatedly violated the regulation by going upon the platform and soliciting for a hotel, though, on the particular occasion when he was ejected from it he had a ticket and intended to take the train destined for another town, but failed to disclose to such servants the fact that he entered for "another purpose, when it was in his power to do so." Were we to follow the analogy to which the principle laid down in that case would lead, an innkeeper could not only make and enforce a regulation forbidding persons to come on his premises for the purpose of soliciting his guests to patronize the livery-stables that they might represent, but he might, in enforcing the rule against one who had previously violated it after notice that he should not do so, put such person off his premises, without excessive force, though at the particular time the person had entered with the *bona fide* intent to become a guest at the hotel, but failed to announce his purpose; or under the same principle, he might expel by force one who becomes a guest and takes advantage of his situation to subject other inmates of the house to the annoyance of drumming for such establishments. The same distinction is drawn between guests and others who enter a hotel intent on business or pleasure, by the courts of Pennsylvania. In *Commonwealth v. Mitchell*, 1 Phila. 63, and *Commonwealth v. Mitchell*, 2 Pars. Cas. 431, it was held that an innkeeper is bound to receive and furnish food and lodging for all who enter his hotel as guests and tender him a reasonable price for such accommodations; but "if an individual (other than a guest) enters a

public inn, and his presence is disagreeable to the proprietor and his guests, he has a right to request the person to depart, and, in case of refusal, to lay his hands gently upon him and lead him out, and if resistance is made, to employ sufficient force to put him out, without incurring liability to indictment for assault and battery."

Justice Story, in *Jencks v. Coleman*, 2 Sum. 224, discussed the doctrine to which we have referred, that the right even of one who pays for his passage on a steamboat or railway is subject not only to the limitation that he shall be sober, and shall not be guilty of such nuisance or make such disturbance as shall annoy other passengers, or whose characters are doubtful, dissolute, suspicious, or unequivocally bad, but to the further restriction that he may be refused admittance, or expelled after he enters the boat or car, if it appear that his object is to interfere with the interests or patronage of the proprietors, or company, so as to make the business less lucrative to them."

In the case last cited, the proprietors of the boat Franklin had entered into a contract to run a line of stages between Boston and Providence in connection with the boat, which was running from New York to Providence. The plaintiff, Jencks, had been in the habit of coming on board the boat at Newport to solicit passengers for an opposition line of stages between Providence and Boston, thus interfering with the business of the owners of the boat, and the arrangement made by them for their own profit and advantage with a different line from that represented by said plaintiff, just as in the case at bar the proprietors of the hotel had entered into a contract with one Sevier by which they were to receive ten per centum of the amount realized by him for the hire of carriages to the guests of the Battery Park Hotel. Justice Story, too, runs the parallel between the hotel and boat line just as Chief Justice Shaw did between the inn and the railway company, but with the marked difference that the former goes much further in tracing the analogy that makes the public house subject to some of the same liabilities created, and entitled to the full measure of protection afforded by law to companies engaged in transporting passengers. In discussing the principle, he says: "A case still more strongly in point, and which, in my judgment, completely meets the present, is that of an inn-keeper. Suppose passengers are accustomed to breakfast or dine or sup at his house, and an agent is employed by a rival

house, at the distance of a few miles, to decoy the passengers away the moment they arrive at the inn. Is the innkeeper bound to entertain and lodge such agent, and thereby enable him to accomplish the very objects of his mission, to the injury or ruin of his own interests? I think not."

In the case of *Barney v. Oyster Bay etc. Steamboat Co.*, 67 N. Y. 302, 23 Am. Rep. 115, the court of appeals held that a company running a line of steamboats for transporting passengers had a right to establish, in connection with their boats, an agency for the delivering of baggage at the terminus, and that one who had had the contract to transfer such baggage upon similar terms two years before could be expelled and refused as a passenger, if, after notice, he would not discontinue his efforts to induce passengers to employ him in the same capacity rather than an expressman with whom the company had entered into a later agreement, for their own pecuniary interest, to deliver the baggage of its passengers. All of the authorities that we have cited above are collated and approved in Angell on Carriers, secs. 530, 530 a, 530 b.

In the case of *Harris v. Stevens*, 31 Vt. 79, 73 Am. Dec. 337, it was held that when a railway company erected station-houses, it impliedly opened the doors of them to every person to enter, but that the license was revocable as to all persons except those who had legitimate business there, growing out of the operation of the road, and with the officers or employees of the company, and that the corporation had the right to direct all other persons to leave the depot or ticket-office, and on their refusal to depart, to remove them. It was further held, in the same case, that it was a reasonable regulation to require every one who expected to take the train, and desired to remain in the station-house for that purpose, to purchase a ticket, and that the servants of the company would be justified in expelling, without excessive force, one who did not declare his purpose to buy a ticket, and actually buy it within a reasonable time, or one who had bought a ticket, even if he failed to disclose that fact when requested to leave.

In the recent case of *Old Colony R. R. Co. v. Tripp*, 147 Mass. 35, 9 Am. St. Rep. 661, the court laid down the rule in reference to the rights of persons at depots, as follows: "Passengers taking and leaving the cars at the station, and persons setting down passengers or delivering merchandise or baggage for transportation from stations, or taking up passengers or receiving merchandise that had been transported to the sta-

tion, had a right to the building and grounds, superior to the right of the plaintiff [corporation] to exclusive occupancy." And it is further held to be the correct construction to be placed on a statute passed by the legislature, giving to all persons "equal terms, facilities, and accommodations for the use of its depot and other buildings and grounds," that it was intended only to govern the relation between the common carrier and its patrons; and hence that a railroad company, even in the face of such a statute, had a right to contract with an individual to furnish the means to carry incoming passengers, or their baggage and merchandise, from its stations, and might grant to him the exclusive right to solicit the patronage of such passengers.

Upon a review of all the authorities accessible to us, and upon the application of well-established principles of law to the admitted facts of this particular case, we are constrained to conclude that there was error in the charge given by the court to the jury, because,—

1. Guests of a hotel, and travelers or other persons entering it with the *bona fide* intent of becoming guests, cannot be lawfully prevented from going in, or be put out by force after entrance, provided they are able to pay the charges, and tender the money necessary for that purpose if requested by the landlord, unless they be persons of bad or suspicious character, or of vulgar habits, or so objectionable to the patrons of the house, on account of the race to which they belong, that it would injure the business to admit them to all portions of the house, or unless they attempt to take advantage of the freedom of the hotel to injure the landlord's chances of profit derived either from his inn, or any other business incidental to or connected with its management, and constituting a part of the provision for the wants or pleasure of his patrons: *Jencks v. Coleman*, 2 Sum. 224; *Commonwealth v. Mitchell*, 1 Phila. 63; *Commonwealth v. Power*, 7 Met. 600; 41 Am. Dec. 465; *Pinkerton v. Woodward*, 91 Am. Dec. 660; *Barney v. Oyster Bay etc. Steamboat Co.*, 67 N. Y. 302; 23 Am. Rep. 115; 1 Wharton on Criminal Law, sec. 621; Angell on Carriers, secs. 525, 529, 531; *Britton v. Atlantic etc. R'y Co.*, 88 N. C. 536; 43 Am. Rep. 749.

2. When persons, unobjectionable on account of character or race, enter a hotel, not as guests, but intent on pleasure or profit, to be derived from intercourse with its inmates, they are there, not of right, but under an implied license, that the

landlord may revoke at any time, because, barring the limitation imposed by holding out inducements to the public to seek accommodation at his inn, the proprietor occupies it as his dwelling-house, from which he may expel all who have not acquired rights growing out of the relation of guest, and must drive out all who, by their bad conduct, create a nuisance and prove an annoyance to his patrons: *Harris v. Stevens*, 31 Vt. 79; 73 Am. Dec. 337; 1 Wharton on Criminal Law, sec. 623.

3. The regulation, if made by an innkeeper, that the proprietors of livery-stables, and their agents or servants, shall not be allowed to enter his hotel for the purpose of soliciting patronage for their business from his agents, is a reasonable one, and after notice to desist, a person violating it may be lawfully expelled from his house, if excessive force be not used in ejecting him: *Commonwealth v. Power*, 7 Met. 600; 41 Am. Dec. 465; *Harris v. Stevens*, 31 Vt. 79; 73 Am. Dec. 337. See also *Grizwald v. Webb*, reported in 41 Alb. L. J. 351, R. L., Nov. 30, 1889; *Old Colony R. R. Co. v. Tripp*, 147 Mass. 35; 9 Am. St. Rep. 661.

4. An innkeeper has unquestionably the right to establish a news-stand or a barber-shop in his hotel, and to exclude persons who come for the purpose of vending newspapers or books, or of soliciting employment as barbers, and in order to render his business more lucrative, he may establish a laundry or a livery-stable in connection with his hotel, or contract with the proprietor of a livery-stable in the vicinity to secure for the latter, as far as he legitimately can, the patronage of his guests in that line for a per centum of the proceeds or profits derived by such owner of vehicles and horses from dealing with the patrons of the public house. After concluding such contract, the innkeeper may make, and after personal notice to violators enforce, a rule excluding from his hotel the agents and representatives of other livery-stables who enter to solicit the patronage of his guests; and where one has persisted in visiting the hotel for that purpose, after notice to desist, the proprietor may use sufficient force to expel him if he refuses to leave when requested, and may eject him even though on a particular occasion he may have entered for a lawful purpose, if he does not disclose his true intent when requested to leave, or whatever may have been his purpose in entering, if he in fact has engaged in soliciting the patronage of the guests: *Barney v. Oyster Bay etc. Steamboat Co.*, 67

N. Y. 302; 23 Am. Rep. 115; *Jencks v. Coleman*, 2 Sum. 224; *Harris v. Stevens*, 31 Vt. 79; 73 Am. Dec. 337; Angell on Corporations.

5. The broad rule laid down by Wharton is, that the proprietor of a public house has a right to request a person who visits it, not as a guest or on business with guests, to depart, and if he refuse, the innkeeper has a right to lay his hands gently on him and lead him out, and if resistance be made, to employ sufficient force to put him out. For so doing he can justify his conduct on a prosecution for assault and battery": 1 Wharton on Criminal Law, sec. 675. It will be observed that the author adopts in part the language already quoted from the courts of Pennsylvania.

6. If it be conceded that the prosecutor went into the hotel at the request of a guest, for the purpose of conferring with the latter on business, still, in any view of the case, if after entering he engaged in "drumming" for his employer, when he had been previously notified to desist, in obedience to a regulation of the house, the defendant had a right to expel him, if he did not use more force than was necessary; and if the prosecutor, having entered to see a guest, did not then solicit business from the patron of the hotel, but had done so previously, the defendant, seeing him there, had a right to use sufficient force to eject him, unless he explained, when requested to leave, what his real intent was: *Harris v. Stevens*, 31 Vt. 79; 73 Am. Dec. 337; *Commonwealth v. Power*, 7 Met. 600; 41 Am. Dec. 465. The guest, by sending for a hackman, could not delegate to him the right to do an act for which even the guest himself might lawfully be put out of the hotel.

7. If we go further, and admit, for the sake of argument, that the principle declared in *Markham v. Brown*, 8 N. H. 523, 31 Am. Dec. 209, and relied on to sustain the view of the court below, is not inconsistent with the law on the same subject, as we find it laid down by Wharton and other recognized authorities, still our case will be found to fall under the exception to the general rule stated in express terms in that case. The court said: "Where one comes to injure the innkeeper's house, or if his business operates directly as an injury, that may alter the case; but that has not been alleged here. Perhaps there may be cases in which he may have a right to exclude all but travelers and those who have been sent for by them. It is not necessary to settle that at this time." There was no evidence in *Markham v. Brown*, 8 N. H. 523, 31 Am. Dec. 209,

that the proprietor of the hotel had any contract with another stage line, or would suffer pecuniary loss or injury if the agent who was expelled were successful in his solicitations, and it seems that Angell and others, who cite as authority that case, as well as *Jencks v. Coleman*, 2 Sum. 224, and *Barney v. Oyster Bay etc. Steamboat Co.*, 67 N. Y. 302, 23 Am. Rep. 115, reconcile them by drawing the distinction that in the latter cases, and in the hypothetical case of an innkeeper put by Justice Story, the person whose expulsion was justified was doing an injury to the proprietor, who had him removed, by diminishing his profits derived legitimately from a business used as an adjunct to that of common carrier or innkeeper. In using the language quoted above, Justice Parker seems to have had in his mind, without referring to it, the opinion of Justice Story delivered in the circuit court but two years before.

8. The defendant, as manager of the hotel, could make a valid contract for a valuable consideration with Sevier to give him the exclusive privilege of remaining in the house and soliciting patronage from the guests in any business that grew out of providing for the comfort or pleasure of the patrons of the house. The proprietors of the public house might legitimately share in the profits of any such incidental business, as furnishing carriages, buggies, or horses to the patrons, and for that purpose had as full right to close their house against one who attempted to injure the business in which they had such interest, as the owner of a private house would have had, and this view of the case is consistent with the doctrine enunciated in *Markham v. Brown*, 8 N. H. 523; 31 Am. Dec. 209. There was no evidence tending to show that Chambers had actual permission from the proprietors to approach the inmates of the hotel on the subject of patronizing him, nor that they had actual knowledge of the fact that he had continued his solicitations after receiving a similar notice to that sent to the prosecutor. The fact that he was overlooked or passively allowed to remain in the hotel (it may be, under the impression on the part of the defendant that he had desisted from his objectionable practices) cannot, in any view of the law, work a forfeiture of the right to enforce a reasonable regulation made to protect their legitimate business from injury. If, therefore, a permit on the part of the defendant to Chambers to "drum" gratuitously in the house would at once have opened his doors to all of the competitors of the latter (a proposition that we are not prepared to admit), the defendant did not, so far as

the testimony discloses the facts, speak to him on the subject, and the soundness of the doctrine that, without interfering with the legal rights of the guests, the proprietor of a hotel is prohibited by the organic law from granting such exclusive privileges to any individual as to the use or occupancy of his premises, as any other owner of land may extend, is not drawn in question.

We therefore sustain the second and third assignments of error. His honor erred, for the reasons given, in instructing the jury that the guilt of the defendant depended upon the question whether he permitted Chambers or Sevier to solicit custom in the house. He had a lawful right to discriminate, for a consideration, in favor of Sevier, while it does not appear from the evidence that he granted any exclusive privileges to Chambers.

We hold that the regulation was such a one as an innkeeper had the power to make, and must not be understood as approving the idea that the sanction of the municipal authorities could impart validity to it, if it were not reasonable in itself, and within the powers which the law gives to proprietors of public houses in order that they may guard their own rights and protect their patrons from annoyance.

For the reasons given, the defendant is entitled to a new trial.

INNKEEPERS. — As to who are innkeepers and who are guests, and their respective rights, remedies, and obligations, see extended note to *Clute v. Wiggins*, 7 Am. Dec. 449-458. In *Markham v. Brown*, 8 N. H. 523, 31 Am. Dec. 209, it was decided that an innkeeper might exclude from his inn all improper characters and disorderly persons; but that he could not expel from the inn the driver of a rival line of coaches, for the misconduct of drivers of other lines, unless at the time of the disturbance and for the purpose of restoring quiet in the house. So an innkeeper cannot exclude a member of the militia merely because other militia-men received as guests on the same occasion had conducted themselves improperly in the inn: *Atwater v. Sawyer*, 76 Me. 538; 49 Am. Rep. 634. Compare *Montana etc. R'y Co. v. Langlois*, 9 Mont. 419; 18 Am. St. Rep. 745, and note, as to the rule with respect to carriers' right to forbid persons to come upon their premises.

CASES
IN THE
SUPREME COURT
OF
PENNSYLVANIA.

**BRICKER v. PHILADELPHIA AND READING RAIL-
ROAD COMPANY.**

[182 PENNSYLVANIA STATE, 1.]

COMMON CARRIER OF PASSENGERS—LIABILITY FOR INJURIES TO INTERLOPER.

— ONE NOT ACCEPTED AS A PASSENGER, and who is on a train without the knowledge or consent of the company, in a car devoted exclusively to the railway mail service, where he was forbidden by notice to remain, and where the employees, in the discharge of their ordinary duties, would not discover him, though possessed of a ticket entitling him to transportation, is not a passenger, and is not entitled to recover for injuries arising from a collision.

COMMON CARRIERS—PASSENGER, DEFINITION OF. — A passenger, in a legal sense, is one who travels in some public conveyance by virtue of a contract, express or implied, with the carrier, as the payment of fare, or that which is accepted as an equivalent therefor.

COMMON CARRIERS—LIABILITY TO PASSENGER. — A carrier, in undertaking to transport passengers safely, undertakes to so carry them only when they place themselves under his direction in particular places prescribed for the purpose. He will not be held liable for damages accruing to an interloper who, unnoticed by him, hides in a place not intended for the transportation of passengers.

TRESPASS by Elizabeth S. Bricker to recover damages for the death of her husband, Jacob L. Bricker, who, on July 2, 1886, took a seat in defendant's passenger-car, from Reading to Pottsville, by way of Port Clinton. At the latter place he left the train, to take another of defendant's trains, to Tamaqua. This train was composed of an engine and tender, a baggage-

car, a combined mail and express car, and two or more passenger coaches. Before entering this train, Bricker went to the side door of the mail-car and had a conversation with the railway postal clerk. He then went into such car, and being ill, the clerk gave him some medicine, and in a few moments afterwards a collision occurred, causing his death. He had not been approached by a conductor, nor asked for his ticket after entering such car, and after his death, a ticket good for transportation was found on his person. At the close of plaintiff's testimony, the court, on motion, granted a judgment of non-suit, and from this judgment an appeal was taken.

C. Stuart Patterson and I. Y. Sollenberger, for the appellant.

Thomas Hart, Jr., for the appellee.

McCOLLUM, J. There is no evidence in this case which warrants an inference that the defendant company accepted Bricker as a passenger on its train from Port Clinton to Lamaqua. He entered a car which he knew was not provided for the transportation of passengers. He was on the train without the knowledge or consent of the company, and in a place where its employees, in the discharge of their ordinary duties, would not discover him. It was a place devoted exclusively to the railway mail service, and in charge of one of its employees. He was confronted by an order of the superintendent of that service, forbidding him to remain there. He was not there for any purpose which related to a duty of the company in the transportation of its passengers or their baggage.

Upon these undisputed facts appearing in the plaintiff's evidence, no contract for safe carriage existed between the company and the deceased. A passenger, in the legal sense of the word, is "one who travels in some public conveyance, by virtue of a contract, express or implied, with the carrier as the payment of fare or that which is accepted as an equivalent therefor": *Pennsylvania R. R. Co. v. Price*, 96 Pa. St. 256. In Wharton on Negligence, sec. 354, the undertaking of the carrier is thus defined: "A carrier, in undertaking to carry passengers safely, undertakes to carry them safely if they place themselves under his direction in particular places prescribed for the purpose; and he will not be held liable for damages accruing to an interloper who, unnoticed by him,

hides in the crevices of a locomotive or in the hold of a ship. In Patterson's Railway Accident Law, sec. 214, it is stated "that the existence of the relation of carrier and passenger is dependent upon the making of a contract of carriage. From this it follows that railways are not liable to persons who have not been accepted as passengers, and the intention of the person to pay his fare, and his good faith, are immaterial, where there has been no contract, express or implied, on the part of the railway."

These quotations from standard text-books correctly state the law on the subject to which they refer. As Bricker was not a passenger, and was on the train without the consent, express or implied, of the company, it owed him no duty, and the nonsuit was rightly ordered. In this view of the case, it is unnecessary to consider whether, if he had been accepted as a passenger, he was guilty of negligence which contributed to the injury he received, and which caused his death.

Judgment affirmed.

CARRIERS—PASSENGERS. — A passenger who rides in a position or place not authorized by the rules of the carrier is presumed to be guilty of contributory negligence: *Note to Ingalls v. Bills*, 43 Am. Dec. 365, 366. When an express company had, by contract with a railroad company, the use of a car in which their agent was permitted to ride without paying any fare, and the agent, without authority to do so, took plaintiff with him into the car, and the conductor, supposing him to be an employee of the express company, suffered him to ride without paying fare, plaintiff was not a passenger, and could not recover damages of the railroad company for injuries sustained by an accident: *Union P. R'y Co. v. Nichols*, 8 Kan. 505; 12 Am. Rep. 475. One who is injured in an accident while unnecessarily riding in a baggage-car, and who would have escaped had he been in his proper place in the passenger-car, cannot recover: *Houston etc. R. R. Co. v. Clemmons*, 55 Tex. 88; 40 Am. Rep. 799; *Pennsylvania R. R. Co. v. Langdon*, 92 Pa. St. 21; 37 Am. Rep. 561; *Kentucky C. R. R. Co. v. Thomas*, 79 Ky. 160; 42 Am. Rep. 208. Liability of company to passengers injured while not riding in the passenger-car: See note to *Nolan v. Brooklyn City etc. R. R. Co.*, 41 Am. Rep. 347-349; note to *Darwin v. Charlotte etc. R. R. Co.*, 55 Am. Rep. 42-44.

CORBALIS v. TOWNSHIP OF NEWBERRY.

[182 PENNSYLVANIA STATE, 9.]

JUDGMENTS—NONSUIT. — In reviewing a motion for nonsuit, the plaintiff is entitled to every reasonable inference of fact that the jury might have drawn from the evidence, and every relevant fact which it tends to prove is to be considered as admitted. Therefore, when such evidence tends to establish a *prima facie* case, it is error to enter a judgment of nonsuit.

JUDGMENTS—NONSUIT — NEGLIGENCE OF TOWNSHIP. — In an action against a township for negligence, where the evidence shows that it failed to keep the approaches to a bridge in proper repair, thereby creating a pit-fall causing an injury to a traveler along the highway, without his fault, a *prima facie* case is established, and it is error to order a judgment of nonsuit. In such case it is within the province of the jury to weigh the evidence and determine the facts.

TRESPASS against the township of Newberry to recover damages for personal injuries alleged to have resulted from the defendant's negligence. Judgment of nonsuit. Plaintiff appealed.

Charles A. Hawkins and H. H. McClune, for the appellant.

H. L. Fisher and John W. Bittenger, for the appellee.

STERRETT, J. In reviewing judgments of nonsuit, the well-settled rule is, that the plaintiff is entitled to every reasonable inference of fact that the jury might have drawn from the evidence. Every relevant fact which it tends to prove is to be considered as admitted by the defendant: *Maynes v. Atwater*, 88 Pa. St. 496.

Tested by that rule, the evidence was quite sufficient to carry the case to the jury on questions of fact which, if determined in favor of plaintiff, would have warranted a verdict in his favor. It was claimed by him that the abutment of the bridge over which he fell and sustained the injury complained of was within the lines of a public highway which the township defendant was bound to maintain in a condition reasonably safe for those who had occasion to use it and the bridge which formed part of the highway; that at the northeast corner of the bridge, the point where he fell over, the top of the abutment was about on the same level as the floor of the bridge and the approach thereto, and extended several feet beyond the side of the bridge, thus making the approach to the abutment several feet wider than the bridge; that the portion of the abutment and approach thereto extending beyond the side of the bridge was negligently left open, without

any guard-rail or other mode of warning travelers of the danger; that when about to cross the bridge, on a dark night, he was misled, and for want of a guard-rail or other suitable barrier, he fell over the projecting portion of the abutment, and perpendicularly down, a distance of about twelve feet, upon the rocky bed of the stream, and was thus severely injured, without any negligence on his part.

Without referring specially to the evidence, it is sufficient to say that it tended to sustain the allegations of the plaintiff. It tended to show the existence, within the lines of the highway, of a dangerous pitfall, which should have been properly guarded, and that for want of such guard plaintiff was injured. It should therefore have been submitted to the jury with proper instructions as to the duty of the township authorities, as well as plaintiff himself. In actions on the case for negligence, such as is alleged in this case, if the plaintiff's evidence tends to make out a *prima facie* case, it is error to enter a judgment of nonsuit. To do so is an invasion of the province of the jury, whose duty, as a general rule, is to weigh the evidence and determine the facts.

The learned judge of the common pleas appears to have thought that the case was ruled by *Monongahela v. Fischer*, 111 Pa. St. 9; 56 Am. Rep. 241; but in that conclusion we think he was mistaken. The case referred to was a very close one, on the controlling question whether the evidence warranted its submission to the jury or not, and depended largely on its own peculiar facts, none of which were disputed. From the report of the case, it appears that the planked culvert, adjacent to the place where the accident occurred, and the approaches thereto, "were well constructed and reasonably safe." The latter were about fourteen feet wide at the edge of the planks, and widened as they receded from the culvert. "The sides of those approaches sloped down from the roadway to the ground at either side. Three of these side-slopes were but slightly elevated. The fourth, on the river side of the roadway and east of the culvert, was between three and four feet at the highest point, next the culvert wall, and gradually diminished as it reached towards the level ground. This construction was required there because a water-way existed along that side of the road, which had to be carried into the culvert within the lines of the highway, and for which provision was made by an opening in the culvert wall." In that case, also, the plaintiff's own account of

how he came to go over the embankment shows that it happened, not in his effort to keep on the traveled roadway, but in endeavoring to cross the same in search of an adjacent footpath. He proceeded, as he testified, "by the right-hand slope of the western approach to the culvert, about twenty steps, and thence diagonally across the culvert from the right-hand side to the left-hand side, intending to leave the wagon-road, and take the footpath by Stewart's fence." Instead of finding the path he was in search of, he "got over the embankment, or steep grade." That was the plaintiff's own account of the manner in which he was injured.

In the case at bar, the unguarded precipice, instead of being a gently sloping embankment of three or four feet, such as are not uncommon on country highways, was an actual pitfall, nearly perpendicular, and about twelve feet high; and the injured party, instead of intentionally crossing the highway diagonally in search of a diverging footpath, was endeavoring to follow the beaten highway, and had every reason to believe he was doing so, until he suddenly went over the unguarded precipice, down onto the rocky bed of the stream below. The facts of the two cases, as indicated by the evidence, are quite different. In the case referred to, the plaintiff's own account of his injury shows that he could and would have traveled the highway in safety, if he had not attempted to cross it diagonally, on a dark night, in search of a diverging footpath. This alone was enough to preclude him from recovering damages from the city. In the case before us, there appears to be nothing on which to base a judgment of nonsuit, or binding instructions to find for defendant.

Judgment reversed, and a *procedendo* awarded.

NONSUITS, WHEN SHOULD NOT BE ALLOWED. — A motion for a nonsuit should be denied when plaintiff has presented any evidence from which the jury might reasonably conclude that there was negligence on the part of defendant: Note to *French v. Smith*, 24 Am. Dec. 623, 624.

McMULLEN v. PENNSYLVANIA RAILROAD COMPANY.

[182 PENNSYLVANIA STATE, 107.]

NEGLIGENCE — RAILROAD'S LIABILITY TO INFANT TRESPASSER. — A boy ten years of age who, just before being injured by a moving train, was lying on his back underneath the cars, and crosswise of the track, and who was not in the employ of the company, nor attempting to cross the track, is a trespasser, and cannot recover for his injury.

NEGLIGENCE — RAILROAD'S LIABILITY TO INFANT TRESPASSER. — A boy ten years of age who is an undoubted trespasser upon a railroad track, where he is injured by a moving train, cannot recover for his injury, notwithstanding his youth, which renders him unaccountable for his own negligence.

CASE against the defendant railroad company to recover damages for the death of a minor, alleged to be due to the negligence of defendant. Verdict and judgment for plaintiff, and defendant appealed.

Gavin W. Hart and David W. Sellers, for the appellant.

William H. Burnett, for the appellee.

GREEN, J. On the trial of this case, the plaintiff examined but one witness to prove the fact and the circumstances of the accident. This is the account she gave of the occurrence:—

Q. Please state just what you saw of this accident. **A.** When I saw the child he was lying on the flat of his back, his head towards the station-house and his feet towards me. **Q.** How was his body,—on the track? **A.** Right in the middle of the track, his body was, and his head. **Q.** Between the tracks, between the rails, do you mean? **A.** Yes, sir. **Q.** Crosswise? **A.** Yes, sir; his feet towards me, and his legs hanging over. **Q.** How near was it to your house? **A.** Right opposite the east window, towards Dauphin Street. **Q.** Which window was you looking out of? **A.** The last one towards Dauphin Street. **Q.** What room of that house? **A.** There was only one room of that house. **Q.** What happened after that? **A.** I saw him before the cars moved at all. They were just slightly moving; just commencing in motion; and he, of course, did n't make no effort to get up. I said to my step-mother, 'There's a child on the track, and he'll be run over,' and she started out on Blair Street, and commenced to halloo, and I went out front. **Q.** That is out on Trenton Avenue? **A.** Yes, sir. The first car went over him, and cut

his foot right off. Then four car-wheels went over him before there was any assistance came."

The witness had previously testified that there was a train of small coal-cars standing on the track, reaching nearly a square, the majority of which were full, and it was under these cars that the boy was lying on his back immediately before and at the time he was run over and killed. She also said the whole train was coupled together; that there was no opening between the cars; and the place of the accident was between two streets. There was no contradiction of these facts; on the contrary, they were confirmed by the defendant's witnesses as to everything they saw, but none of them saw the actual collision. Several of the train-men who were examined came to the spot immediately after the accident, and one of them lifted the boy out from underneath the car. Two of them testified to seeing a pan about half full of coal by the side of the boy, and one of them removed it.

The undisputed facts, therefore, are, that the boy, just before the accident, was lying on his back on a railroad track, crosswise the track, with his feet reaching over one of the rails, and his head between the rails. The train was just starting, and was moving slowly, so that it was stopped when four wheels had passed over the boy. He was lying underneath the cars, and there is no evidence that he was endeavoring to cross the track. As a matter of course he was not, and could not be, in such circumstances, in the exercise of any legal right. Railroad tracks are not made for persons, young or old, to lie down upon, in any circumstances; much less so when cars are standing on the track. They are not intended for any such use, and any person who makes such use of a track is undoubtedly a trespasser.

The question is not an open one. Had this boy been an adult, as a matter of course he could not have recovered, both because of his own negligence and of his being a trespasser. The boy was ten years old, and therefore cannot be held accountable for his own negligence; but, as a clear trespasser, recovery is equally impossible, notwithstanding his youth, and this we have many times decided. In every one of the following cases we held there could be no recovery, although the persons injured were children, upon the express ground that they were trespassers: *Philadelphia etc. R. R. Co. v. Hummell*, 44 Pa. St. 375; 84 Am. Dec. 457; *Flower v. Pennsylvania R. R. Co.*, 69 Pa. St. 210; 8 Am. Rep. 251; *Duff v.*

Allegheny R. R. Co., 91 Pa. St. 458; 36 Am. Rep. 675; *Cauley v. Pittsburgh etc. R'y Co.*, 95 Pa. St. 898; 40 Am. Rep. 664; 93 Pa. St. 498; *Hestonville Pass. R'y Co. v. Connell*, 88 Pa. St. 520; 32 Am. Rep. 472; *Moore v. Pennsylvania R. R. Co.*, 99 Pa. St. 301; 44 Am. Rep. 108; *Baltimore & O. R. R. Co. v. Schwinding*, 101 Pa. St. 258; 47 Am. Rep. 706. In several of them the child was considerably younger than in this case. In not one of them was the trespass of the child so gross, so palpable, so conspicuous, as in this. The doctrine has been so elaborately discussed and so fully expounded and illustrated in several of the opinions of this court in the cases referred to, that it is entirely unnecessary to repeat the discussion here.

We are clearly of opinion that the defendant's ninth point should have been affirmed, and a verdict for the defendant directed.

Judgment reversed.

THE CASE OF *Mitchell v. Philadelphia etc. R. R. Co.*, 122 Pa. St. 226, was an action of trespass brought to recover damages for personal injuries. The plaintiff was a boy nine and one half years of age who, on the day of the accident, was walking between the tracks of defendant's railroad, and to avoid some water in his path, stepped upon the ties of one of the tracks, and was struck by the cars after he had taken about three steps. The cars which caused the accident were two empty flat-cars, moving by their own momentum, no engine being attached. The cars were in charge of a brakeman, who was looking in the direction of the child at the time of the accident. At the close of plaintiff's testimony, a judgment of nonsuit was rendered, and on appeal, this judgment was affirmed, the appellate court being of opinion that such judgment was entirely justified by the evidence. The plaintiff, being a mere trespasser, was not entitled to recover.

RAILROAD COMPANIES — NEGLIGENCE — INFANT TRESPASSERS UPON THE TRACK. — Where an infant is a trespasser upon a railroad track, the rule seems to be that the company must exercise toward him a degree of care, caution, and vigilance not required with respect to adult persons under the same circumstances: Note to *Westbrook v. Mobile etc. R. R. Co.*, 14 Am. St. Rep. 595, 596; although the rule as laid down in the Pennsylvania cases is otherwise: Id.; note to *Cauley v. Pittsburgh etc. R'y Co.*, 40 Am. Rep. 667-670.

KELLY v. BENNETT.

[122 PENNSYLVANIA STATE, 213.]

PRACTICE. — REFUSAL TO GRANT NONSUIT cannot be assigned as error.**PRACTICE. — REFUSAL TO GIVE SEVERAL INSTRUCTIONS** cannot be joined in one assignment of error.**NEGLIGENCE. — A POINTED IRON FENCE FOUR FEET HIGH** erected along a sidewalk to protect an area-way and dwelling-house is a lawful structure, and the owner thereof is not liable in damages to one who, while passing along the sidewalk, slips, and in falling comes in contact with one of the points of the fence, whereby he is injured.

TRESPASS to recover for personal injuries. Plaintiff recovered a verdict and judgment, and defendant appealed.

Andrew Zane, for the appellant.

J. Campbell Lancaster and William Henry Lez, for the appellee.

PAXSON, C. J. While this is a plain case for a reversal, we are embarrassed by the defective manner in which it was presented. The assignments of error are very carelessly or unskillfully drawn, and do not meet the case. Indeed, if we were to stand upon mere technicalities, we would be compelled to affirm the judgment.

The first assignment is to the refusal of the court to grant a nonsuit, which we have said at least a hundred times is not assignable as error. The second and last assignment alleges error in not affirming the defendant's first, second, and fourth points. The manner of assigning these errors is wrong, as our rules require separate assignments in such cases. Only one point or subject should be embraced in an assignment of error.

The defendant's first point is as follows: "If the jury believe that the accident occurred by the plaintiff stepping on the pavement, by reason of ice or any other material, then the plaintiff cannot recover." Inadequate as this point is to reach the merits of the case, we nevertheless think it should have been affirmed, in view of the undisputed facts. The defendant below is the owner of a dwelling-house at the northeast corner of Spruce and Quince streets, in the city of Philadelphia. In front of his house, on Spruce Street, there was an iron railing about four feet high, to protect an area-way, and perhaps the front of the house. The railing was pointed at the top, of the arrow-head pattern. The plaintiff, while walking along the pavement on the afternoon of January 25, 1888, slipped,

by reason of the snow or ice, or both, and, in falling, put out his hand, which came in contact with one of the points of the railing, and was lacerated. For this injury he recovered a verdict of \$732 in the court below.

The defendant was not shown to have been negligent in any respect. The railing was a lawful structure. The defendant had a right to protect his area in that manner. Had he not done so, and some one had fallen therein, and been injured, there would have been more reason in charging him with negligence. It is said, however, that it should have been constructed without points. This is not so clear. The points are useful in preventing mischievous boys from climbing over it.

What reason had the defendant to anticipate that the plaintiff would slip and fall precisely at that spot, and that in doing so he would reach out his hand and strike the railing? And if he had not such reason, the railing cannot be regarded, under our cases, as the proximate cause of the injury. It will not do to say that the mere fact of the injury is evidence of negligence on the part of defendant. Had there been no railing there, the plaintiff might have fallen with his head against the sharp edge of the step, and received a far worse injury; and if he may recover in the one case, why not in the other? It will not do to hold that when a man slips upon an icy pavement the owner of the pavement or the fence, or the steps upon which he falls, must compensate him for any injury he may receive. Few men would be willing to own property under such conditions. This plaintiff has no case, and we will not dignify it by a further discussion.

Judgment reversed.

AS A GENERAL RULE, IN THE ABSENCE OF SPECIAL CIRCUMSTANCES, if a person traveling upon a highway deviates therefrom, and falls into a pit or excavation on the adjacent premises, the owner of the land is not liable: *Beck v. Carter*, 68 N. Y. 283; 23 Am. Rep. 175, and note 183, 184.

PHILADELPHIA TOOL COMPANY v. BRITISH AMERICA
ASSURANCE COMPANY.

[18: PENNSYLVANIA STATE, 226.]

INSURANCE — WAIVER OF CONDITIONS. — Where a policy of insurance on tools and buildings of the assured, who has only a leasehold interest in the buildings and in the land upon which they rest, is issued, and an entire premium paid, without any application, written request, or representation of any kind by the assured relative to his interest in the buildings, it is valid and binding, notwithstanding conditions therein that it shall be void if the insured is not the sole and unconditional owner of the property, or if the buildings stand on land not owned by him in fee-simple, or if his interest is not truly stated in the policy. In such case it will be assumed that the policy was written upon the knowledge of the insurer through its representative, and intended to cover, in good faith, the interest which the insured had in the buildings.

INSURANCE — CONSTRUCTION OF POLICY. — A policy of insurance is to be read in the light of circumstances which surround it, and interpreted most strongly against the insurer.

DEBT upon a policy of insurance to recover for loss by fire.
Judgment for defendant, and plaintiff appeals.

Thomas R. Elcock, for the appellant.

Isaac S. Sharp and S. H. Alleman, for the appellee.

WILLIAMS, J. A glance at the facts of this case will prepare the way for the application of the legal principles that control it. The action is on a policy of insurance. The insured was a manufacturing company occupying brick and frame buildings on Oakford Street, in the city of Philadelphia, as a lessee. Its machinery and tools were in these buildings, in which its business was conducted. It had no title, legal or equitable, to the real estate, and no interest in it except as lessee. Its property was therefore all personal, and insurable as such, consisting of the leasehold interest in the real estate, and the machinery and tools used in the business. The tool company wanted insurance on its property. In some manner, not explained by the testimony, this fact became known to the representative of the British America Assurance Company, and that company issued a policy for two thousand five hundred dollars, one thousand of which was on the buildings, and the remainder on the tools and machinery contained therein. The defense now taken is, that the policy is partly upon real estate and partly on personal property, for which an entire premium was paid, and that as the assured had no title to the land, the policy is void as to it, and being void in part, is

void in whole, so that no recovery can now be had. This position rests on one of the almost innumerable conditions, stipulations, and provisos which appear on the policy, and which asserts that if the assured is not the sole and unconditional owner of the property, or if the building stands on ground not owned in fee-simple by the assured, or if the interest of the assured is not truly stated in the policy, then the policy shall be void. Is this condition applicable to the case presented on this policy?

A policy of insurance, like any other contract, is to be read in the light of the circumstances that surround it. This policy was issued without any application or written request describing the interest of the assured in the buildings. No actual representation of any sort upon the subject, oral or written, is alleged to have been made by or on behalf of the assured. We ought to assume that a policy written under such circumstances was written upon the knowledge of the representative of the insurer, and intended to cover in good faith the interest which the insured had in the buildings. Fraud is never to be presumed, and in this case no fraudulent representation is shown or alleged, unless it can be deduced from the statements of the insurer, made, as we must presume, on the knowledge of its representative, and for which the insured is in no manner responsible. We must also remember that this policy is to be interpreted most strongly against the company whose contract it is.

Applying these principles to the question now raised, we conclude that the policy written on the knowledge of the insurer was made in view of the facts of the case, and was intended to cover such interest in the buildings as the insured had. This was a leasehold only; but it was an insurable interest. Presumably it is the interest which an application, if one had been made, would have shown, for it is the only interest which the tool company ever had, or claimed to have. To such an interest, the proviso whose protection is invoked is not applicable. The policy covering only the interest of the lessee, the ownership of the fee becomes immaterial. The lessee cannot control its transfer, and has no right to be heard upon any subject relating to its ownership, so long as its possession under its lease is not disturbed. This view of the case renders it unnecessary to refer to the cases cited in support of the general doctrine that a false affirmation of ownership, on which insurance is induced, will relieve the insurer from

liability on the policy. The court below erred in entering judgment *non obstante veredicto* on the reserved point, and judgment is now entered on the verdict.

MITCHELL, J., dissented.

INSURANCE — CONSTRUCTION OF POLICY. — Conditions and provisos in a policy are to be construed strictly against the insurance company: *Hofman v. Etna F. Ins. Co.*, 32 N. Y. 406; 88 Am. Dec. 337; *Paul v. Travelers Ins. Co.*, 112 N. Y. 472; 8 Am. St. Rep. 758; *Imperial F. Ins. Co. v. Dunham*, 117 Pa. St. 460; *Dwelling-house Ins. Co. v. Hoffman*, 125 Pa. St. 626; *Darrows v. Family Fund Soc.*, 116 N. Y. 537; 15 Am. St. Rep. 430, and note.

INSURANCE — WAIVER OF CONDITION. — An insurance company may waive the right to forfeit a policy for a breach of the condition contained therein as to the title of the assured in the property insured: *Insurance Co. v. Barnes*, 41 Kan. 161; *Hartford Ins. Co. v. Haas*, 87 Ky. 532.

INSURANCE — CONCEALMENT OF FACTS BY THE ASSURED. — Concealment of material facts by the assured, when no inquiry is made concerning them, will not vitiate a policy of fire insurance: *Hartford F. Ins. Co. v. Harmer*, 2 Ohio St. 452; 59 Am. Dec. 684; *Campbell v. American Ins. Co.*, 73 Wis. 100.

INSURANCE — WAIVER OF FORFEITURE. — The right to enforce the forfeiture of a policy must be regarded as waived, where, after a knowledge on the part of the company of a breach of condition, it still treats the policy as in force: *Queen Ins. Co. v. Young*, 86 Ala. 424; 11 Am. St. Rep. 51, and note; and knowingly taking a premium after condition broken estops the company from enforcing a forfeiture: *Germania F. Ins. Co. v. Hick*, 125 Ill. 351; 8 Am. St. Rep. 385, and note. Conditions in a policy are considered waived, which, to the knowledge of the agent, would make the policy void as soon as delivered: *Ment v. Home Ins. Co.*, 76 Cal. 51; 9 Am. St. Rep. 153.

VAIL v. WEAVER.

[122 PENNSYLVANIA STATE, 363.]

FIXTURES — INTENTION AS TEST. — The machinery and apparatus of an electric-light plant will not pass under a judicial sale of the real estate to which they are annexed, when it is shown that when they were so annexed it was intended that they should remain temporarily. Mere physical annexation is no longer the test.

REPLEVIN for an engine, dynamo, and appliances constituting an electric-light plant. Plaintiff claimed the property as the purchaser of it as agent of Westinghouse, Church, Kerr, and Company, at an execution sale under a judgment of said company against the Pennsylvania Tack Works. The defendant claimed the property under a prior sale of the real property to which it was annexed, made under a judgment upon a mortgage of the land before the plant was annexed.

The Pennsylvania Tack Works owned the land upon which they conducted business, and also owned an opera-house across the street from the tack-works. While the land was subject to mortgage, the electric plant was purchased and set up in the iron-house and wire-nail department of the tack works, by the company operating the latter. This part of the tack factory was of brick, and connected with the main factory by a corridor twelve to fifteen feet wide. The tack-works company built a partition to protect the electric plant from the remainder of the building. To support the engine which operated the electric plant, the company erected a foundation wall, five or six feet deep, below the floor, six feet square at the bottom, two feet at the bottom filled in with stone and mortar, and four feet of brick. Six iron bolts were walled into the masonry. The brick wall was raised a foot and one half above the floor, and upon this the engine was bolted and firmly secured. To support the dynamo, joists were laid upon the floor of the room partitioned off, a floor of two-inch plank laid down, and a square frame of eight pieces of timber placed thereon. This frame was nailed and made fast to the floor. The dynamo rested upon the frame, and fastened to the floor by means of bolts. It was connected with the engine by belts. Wires connecting with the lights were passed out through holes bored in the brick wall. The steam for the engine was supplied by boilers, which also furnished power for the tack machinery. A number of lights were supplied to the tack factory, but a much greater number were supplied to the opera-house. There was a dispute as to whether the electric plant was put in with the intent of simply supplying the tack factory with light, or whether the intention in erecting it was only to light the opera-house. The court instructed the jury that the intent with which the plant was erected must govern in determining whether it was a fixture or not, and that mere physical annexation to the realty would not constitute it a fixture, if it was the intent of the parties to place it there for a mere temporary purpose. Verdict and judgment for plaintiff, and defendant appeals.

Montgomery Evans and Louis M. Childs, for the appellant.

Henry C. Boyer and Samuel D. Huey, for the appellee.

Per CURIAM. The principal question in this case was, whether the machinery and fixtures of the electric plant which were placed in the tack-works were placed there permanently

or not. If they were temporary fixtures, placed there for a temporary purpose, their sale under the writ of *feri facias* passed a good title. Mere physical annexation is no longer the rule. It is a question of intention. The intention to annex, whether rightfully or wrongfully, is the legal criterion: *Hill v. Sewald*, 53 Pa. St. 271; 91 Am. Dec. 209; *Seeger v. l'ettit*, 77 Pa. St. 437; 18 Am. Rep. 452; *Morris's Appeal*, 88 Pa. St. 368. This question was submitted to the jury by the learned court below, under adequate instructions, and their verdict ends the case.

Judgment affirmed.

FIXTURES, TEST OF. — Physical annexation to realty is not alone sufficient to change the character of personalty to a fixture; whether a chattel becomes a fixture depends upon the character of the act by which it is put into its place, the uses to which it is put, the policy of the law connected with its purpose, and the intention of those concerned: *Atchison &c. R. R. Co. v. Morgan*, 42 Kan. 23; 16 Am. St. Rep. 471, and note.

WACHTER v. PHOENIX ASSURANCE COMPANY.

[182 PENNSYLVANIA STATE, 428.]

INSURANCE — ESTOPPEL BY APPROVING ACT OF AGENT. — When a soliciting agent for an insurance company, after issuing a policy, indorses a clause thereon making it payable, in case of loss, to a mortgagee, which act was approved by the company, and subsequently to which the agent assured the parties that nothing more need be done to secure the mortgagee in case of sale of the property, the company will be estopped, in the event of loss after such sale, to deny the authority of the agent to make such assurance.

PRINCIPAL AND AGENT — AGENT'S ACTS, HOW FAR BINDING. — As to third persons, the principal is bound by the acts or representations of his agent, made or done within the apparent scope of his authority; and his actual instructions do not govern unless the person dealing with him had notice or was put upon inquiry as to his real authority.

ESTOPPEL, WHEN QUESTION OF LAW. — When the facts necessary to create an estoppel are admitted, or clearly and conclusively established, the court may declare the law applicable to such facts without submitting them to the jury.

ASSUMPSIT on a policy of insurance to recover for loss by fire. Judgment for plaintiff, and defendant appeals.

Isaac Elwell, Samuel Dixon, and William McGeorge, Jr., for the appellant.

Frederick Gaston and John E. Faunce, for the appellee.

STERRETT, J. The facts upon which this contention appears to hinge are few and undisputed. In December, 1885,

the Phoenix Assurance Company, defendant below, issued a policy of issuance to Charles Otto Wade, for one thousand dollars, on his frame cottage at Anglesea, New Jersey. The risk was solicited and policy delivered to the insured by J. P. Spofford, of Holly Beach, who, in that regard, at least, acted for the company. Shortly afterwards, Wade borrowed from Noah Wachter, the plaintiff below, \$850, secured by a mortgage of the cottage property, supplemented by the insurance policy. For the purpose of having the latter properly indorsed or transferred, so that, in the event of loss by fire, the insurance money would inure to the benefit of the mortgagee, Wade called on Spofford, informed him of the transaction, and requested that the policy be properly transferred to Wachter, the mortgagee. Spofford took the policy, and promised to have it attended to. Before anything further was done, however, Wade and Wachter, together, went to see him in regard to the matter. Spofford took the policy out of his desk, and wrote in it the words, "Loss, if any, payable to Noah Wachter, mortgagee," and then handed it to Wade, saying, "That is all right now"; and thereupon Wade delivered it to Wachter. The action of Spofford in thus changing the policy was recognized and approved by the agent of the company at Vineland, New Jersey, and also by the New York agent. The latter testified as follows: "The clause in this policy, 'Loss, if any, payable to Noah Wachter, mortgagee,' was entered on our books in the New York office on report of our Vineland agency. It was reported to us some time in February, 1886." Frank E. Wanser, an employee in the office of the Vineland agency, was called by the company, and testified thus: "The policy stood on the register in our office in the name of Charles Otto Wade, loss, if any, payable to Noah Wachter, mortgagee; and I so reported the policy to the home office, in New York. This insurance was effected by J. P. Spofford, our solicitor at Holly Beach. Spofford was in our employ." Washington Irving, the New York agent, called by the company, further testified that the insurance was "effected by Tuller and Wanser, the agents at Vineland, through solicitor at Holly Beach; that a mortgage clause, called 'a rider to the policy,' was in use by the company, containing the provision that no act of the mortgagor violating conditions shall affect the mortgagee," and that "there is no extra charge for attaching such a clause."

When Wade conveyed the property to Dougherty, he went

to Spofford, informed him of the sale, and inquired of him in regard to the transfer of the policy of insurance to Wachter. In the language of the witness, "He [Spofford] said, 'You don't need to do that, because it is already transferred to Wachter as mortgagee'; and I said, 'Then it is all right as it is, is it?' and he said, 'Yes; you need not do anything more.'" Satisfied with that assurance, nothing more was done by either Wade or Wachter. They rested in the belief that the policy was so transferred that in the event of a loss by fire Wachter would be entitled to demand the insurance money, and apply it to payment of the mortgage debt.

The cottage was afterwards destroyed, and the insurance company having refused to pay the loss, this suit was brought by Wachter to compel payment. The company then sought to impale him on several sharp points, one of which is, that by the sale to Dougherty without a proper transfer of or indorsement on the policy, the latter became null and void.

In view of the undisputed facts above recited, the defense is a most ungracious one, — a defense which, under the circumstances, no reputable underwriter would think of interposing. The insured and the mortgagor both appear to have acted in entire good faith. There is not a particle of evidence to indicate anything to the contrary. When the mortgage was given, and they wished to have it so changed that the mortgagee might hold it as an available security for the loan, they both went together to Spofford as the agent of the company, and he wrote into the policy the words above quoted, and thereupon it was delivered to the mortgagee. The act of Spofford, in writing into the policy the clause referred to, was recognized and approved by the company. Why, then, should it not be estopped from denying his authority to do what was afterwards done in relation to the same policy as a continuing security in the hands of the mortgagee? If, instead of going to Spofford for the purpose of having the policy properly transferred or indorsed, so that it would inure to the benefit of the mortgagee notwithstanding the conveyance to Dougherty, the insured and his mortgagee had applied to the general agent of the company in New York, and he had assured them, as Spofford did, that nothing further to that end was necessary, that for the purpose of indemnifying the mortgagee, the policy was already properly transferred, etc., it cannot be doubted that the company would be estopped from alleging anything to the contrary: *Mentz v. Armenia F. Ins. Co.*, 79

Pa. St. 478; 21 Am. Rep. 80. In that case, the company's agent told the assured that the proper indorsement on the policy had been made. It was held that his declaration operated as an estoppel, because it lulled the assured "to sleep, by the assurance that the condition of the policy had been complied with, and that the indemnity was secured."

As was well said by the learned president of the court below, the company confirmed Spofford's act in altering the policy in question, and delivering it in that condition to Wachter. It thereby accredited him as its agent, at least as to that particular risk; and therefore what he said in reference to the policy, etc., was as binding on the company as if he had been its general agent. It clothed him with at least apparent authority in regard to the policy in question; and as to parties dealing with him on the faith of that, it should not be permitted to deny his authority to act as he did: *Hubbard v. Tenbrook*, 124 Pa. St. 291; 10 Am. St. Rep. 585. In *Griswold v. Gebbie*, 126 Pa. St. 353, 12 Am. St. Rep. 878, our brother Mitchell recently said: "The general rule that a principal is responsible for the misrepresentations of his agent within his authority is beyond question; and the better opinion is, that as to third parties affected by his acts or words, it is the apparent scope of his authority, and not his actual instructions, that must govern. That is the basis on which the business of the world in the present day is transacted, and the rule should be enforced in a liberal spirit, with regard to the actual habits of the community." Other authorities to the same effect might be cited, among which are: *Millville etc. Ins. Co. v. Mechanics' etc. Ass'n*, 48 N. J. L. 652; *Redstrake v. Cumberland etc. Ins. Co.*, 44 N. J. L. 294; Wood on Insurance, sec. 392. The learned author of the work last cited says: "It would be disastrous to commercial as well as other interests if a person, by acting through the agency of another, could shield himself from liability for such person's acts *ad libitum*. Fortunately, no such rule exists; and he who intrusts authority to another, in whatever department of business, is bound by all that is done by his agent within the scope of his apparent power, and cannot screen himself from the consequences thereof upon the ground that no authority in fact was given him to do the particular act, unless the act was clearly in excess of his apparent authority, or was done under such circumstances as put the person dealing with him upon inquiry as to the agent's real authority."

Perhaps it may be said that while the evidence referred to tends to create an estoppel, the question of Spofford's real or apparent agency in the premises, etc., should have been submitted to the jury under proper instructions. That would be so if there was any conflict of testimony, but there is none. All the essential facts are clearly and conclusively established by uncontroverted evidence, part of which was introduced by the company itself. When the facts are admitted, or established beyond all controversy, as they are in this case, there is no necessity for submission to a jury. It then becomes the province of the court to declare the law applicable to such facts. That was done in this case; and for reasons above suggested, we think there is nothing in the record that calls for the reversal of the judgment.

Judgment affirmed.

INSURANCE — RATIFICATION OF AGENT'S ACTS. — Where an insurance company grants a policy, thereby ratifying the acts of its agent who made out the application, it is estopped to defend against a recovery upon the policy on the ground of the agent's conduct: *Germania F. Ins. Co. v. Hick*, 125 Ill. 351; 8 Am. St. Rep. 384; *Pickel v. Phoenix Ins. Co.*, 119 Ind. 292; *Western etc. Ins. Co. v. Rector*, 85 Ky. 294; *Dunbar v. Phoenix Ins. Co.*, 72 Wis. 492; for the company, rather than the assured, must bear the loss occasioned by an agent acting within the scope of his authority: *Commercial etc. Ins. Co. v. State*, 113 Ind. 331.

AGENCY — PRINCIPAL, WHEN BOUND BY AGENT'S ACTS. — A principal is bound by the false representations of his agent, either when made within the apparent scope of his authority, or when, not so made, they are subsequently ratified by the principal: *Du Souchet v. Dutcher*, 113 Ind. 249; and third parties dealing with agents in good faith are not bound by limitations of his authority by private instructions which are unknown to them, and not properly inferable from the nature of the agent's employment: *Lister v. Allen*, 31 Md. 543; 106 Am. Dec. 78.

MARSTELLER v. MARSTELLER.

[182 PENNSYLVANIA STATE, 517.]

JUSTICE'S JUDGMENT AS RES JUDICATA. — A judgment rendered by a justice of the peace in an action under the landlord and tenant act, deciding that the relation of landlord and tenant did not exist, and that no rent was in arrear, is, until reversed or regularly set aside, a complete bar to another proceeding before another justice upon the same cause of action.

JUDGMENT AS RES JUDICATA. — The judgment of a court of competent jurisdiction, whether of record or not, and whether in a proceeding according to the course of the common law, or summary in its character, if upon a point litigated by the parties, is conclusive in all subsequent suits directly involving the same question, until reversed or legally set aside.

An exception to this rule exists in an action of ejectment on a legal title in which successive suits may be prosecuted until two concurring judgments are obtained.

E. G. Schwartz, for the appellant.

Allen H. Focht and William H. Sowden, for the appellee.

STERRETT, J. It appears, by the charge of the court, and the evidence, that in June, 1889, a proceeding against the defendant below, under the landlord and tenant act of April 3, 1830, commenced before Isaac A. Kase, Esq., a justice of the peace, etc., was so proceeded in, that after a full hearing the justice found "that no demise was made, the relation of landlord and tenant not established," and on July 3, 1889, gave judgment in favor of the defendant and against the plaintiff, and thereupon dismissed the complaint, "with costs to be paid by the plaintiff"; that within a month after the rendition of the judgment, and while it remained, as it still does, in full force, neither reversed nor appealed from, the present proceeding was commenced before another justice of the peace by the same plaintiff, against same defendant, on the same alleged demise. In view of these facts, it was claimed by defendant below that the former judgment, being for the same cause of action and between the same parties, is a bar to this proceeding; and in his second point, reciting the substance of the former proceeding, judgment, etc., he requested the court to charge that the finding of the justice in that proceeding "is conclusive, and the verdict of the jury must be for defendant." The refusal of the court to so charge constitutes the ninth specification of error. In that part of the charge recited in the fifth specification, the learned judge also, in substance, instructed the jury that the former proceedings and judgment did not interfere with the plaintiff's right to recover in this case. The question, therefore, presented by the fifth and ninth specifications is as to the effect of the former judgment.

If the ruling complained of be correct, there is nothing to prevent an unsuccessful landlord from instituting as many successive proceedings for the same cause against his alleged tenant as he can find justices of the peace in the county. Such a thing would certainly be an anomaly in our system of jurisprudence, the underlying principle of which is, that no one shall be twice vexed for the same cause. The well-nigh universal rule is, that the judgment of a court of competent juris-

diction, whether it be a court of record or not, upon a point litigated between the parties, is conclusive in all subsequent controversies directly involving the same question. The only exception to this rule that is now recalled is the action of ejectment on a legal title, in which successive suits may be brought and prosecuted until two concurring verdicts and judgments are obtained.

In this case, the justice before whom the first proceeding was commenced heard the testimony, and found as a fact that there was no demise; that the relation of landlord and tenant did not exist; and he therefore entered judgment for the defendant, and dismissed the complaint, at the plaintiff's cost. That judgment, predicated, as it was, of the facts found by the justice, went to the very root of the controversy, and is final and conclusive on both parties until legally set aside or reversed. On general principles, there is no reason why it should not be so. It makes no difference whether that adjudication was in a proceeding according to the course of the common law, or summary in its character. It is quite enough that the question in controversy was submitted to a judicial officer, to be determined in a judicial way; that the parties and their proofs were heard, and their rights settled by a judicial determination. If, in any such determination, error intervenes, it must be corrected in an orderly way, if any is provided; if not, the judgment must be accepted as a finality.

The only authorities we have been referred to as sustaining the ruling of the court below are *Ayres v. Novinger*, 8 Pa. St. 414, and *Jackson & G. on L. & T.*, 299. What was said by the learned judge, in the first of these, appears to be mere *obiter dictum*, in relation to a matter that was not involved in the case then before the court, and no authority is cited in support of the doctrine there asserted. The principle stated by the text writers is evidently traceable to the *dictum* found in *Ayres v. Novinger*, 8 Pa. St. 414, and can add no weight thereto.

The fifth, ninth, and eleventh specifications are sustained. Inasmuch as the error pervading these is fundamental, it is unnecessary to notice the remaining eight assignments.

Judgment reversed.

JUSTICE'S JUDGMENT, CONCLUSIVENESS OF. — A judgment of a justice of the peace who has jurisdiction over the parties and the subject-matter is valid and binding till reversed: *Hendrickson v. St. Louis etc. R. R. Co.*, 34 Mo. 188; 84 Am. Dec. 76, and note; and is a bar to a second suit of the same

nature: *Kase v. Best*, 15 Pa. St. 101; 53 Am. Dec. 573. Compare *Billings v. Russell*, 23 Pa. St. 189; 62 Am. Dec. 330, and cases cited in note. A judgment of a justice of the peace is a judicial proceeding within the meaning of section 1 of article 4 of the United States constitution; and being made in one state, is as conclusive between the parties and privies thereto, though living in another state, as a judgment of the highest court of record: *Carpenter v. Pier*, 30 Vt. 81; 73 Am. Dec. 288.

EJECTMENT, CONCLUSIVENESS OF JUDGMENT IN: See note to *Caperton v. Schmidt*, 85 Am. Dec. 208-211.

HEMPHILL v. YERKES.

[182 PENNSYLVANIA STATE, 545.]

BANKS AND BANKING — PROOF OF OWNERSHIP OF DEPOSIT. — Money deposited in bank by one person may be shown to belong to another, either by the latter or his attaching creditor; but in the absence of any claim by the real owner, the bank cannot dispute the title of the depositor, and is bound to honor his check.

BANKS AND BANKING — CHECKS — EFFECT OF ASSIGNMENT OF. — A check drawn against the whole of a specific fund deposited in bank in the name of the drawer, but the equitable title to which is in the payee, transfers to him the legal title also, even as against the drawer, and the indorsement and delivery of the check by such payee to his assignee for a valuable consideration vests the legal title to the deposit in the latter as against subsequent attaching creditors of the original payee and assignor.

AMICABLE action to determine the ownership of a deposit in bank. Judgment for plaintiffs, and defendants appeal.

Alfred P. Reid and R. T. Cornwell, for the appellants.

William J. Butler, Jr., and Windle, for the appellees.

PAXSON, J. This case stated is very inartificially drawn, and might well be quashed for this reason. Instead of being a clear statement of facts agreed upon, we are referred for many of the facts to the answers of the garnishees, and to certain affidavits which are attached to the case stated, and made a part thereof. As an examination of them enables us to gather the material facts with reasonable certainty, we will dispose of the case as presented.

The fund in controversy was deposited in bank to the credit of R. Jones Monaghan, master. It amounted to \$634.14, and was part of a fund which had come into the hands of Mr. Monaghan as master, appointed by the court to make sale of certain real estate under a decree in partition. The fund in bank represented the share of Jonathan P. Yerkes in the proceeds of the sale of said real estate, all of the other heirs hav-

ing been paid in full. Under these circumstances, the fund in bank, although deposited in the name of Mr. Monaghan as master, was really the money of Yerkes. He was the equitable owner thereof, and entitled to demand the legal title. It was held in *First Nat. Bank v. Mason*, 95 Pa. St. 113, 40 Am. Rep. 632, that money deposited in a bank to the credit of A may be shown to be the property of B. It may be reached by attachment on the part of the judgment creditors of B, or its payment by the bank to A may be stopped by a proper notice on the part of B that the money belongs to him. The credits on the books of the bank are but *prima facie* evidence of ownership. It is equally well settled, however, that in the absence of any claim by the real owner, the bank cannot dispute the right of its depositor, and is bound to honor his check.

On February 7, 1838, at or about six o'clock, P. M., the said Jonathan P. Yerkes called upon Mr. Monaghan at his office, and received from him a check of that date for \$634.14, the full amount of the deposit. The check was drawn as master, against a fund standing to Mr. Monaghan's credit as master. It was drawn against a particular fund, and for the whole of it. Yerkes then and there delivered to the master a full release and discharge for the same. All the other parties to the equity suit had previously released him. He was the last party to whom a check was given; all the other parties had been fully paid some months before. This placed the legal as well as the equitable title to the fund in Jonathan P. Yerkes. It is true, as a general principle, that a check drawn in the ordinary form vests no title to the general funds of the drawer in the bank upon which it is drawn: *Loyd v. McCaffrey*, 46 Pa. St. 410; *First N. Bank v. Gish*, 72 Pa. St. 12. This principle and these cases do not apply. The check was not drawn against the general funds of Monaghan; it was drawn against the whole of a specific fund which, in equity, belonged to the payee, and, as before observed, passed the legal title to the fund, even as against the drawer. Mr. Monaghan could not have withdrawn or repudiated that check; an attempt to do so would have been a fraud. To have drawn it out and converted it to his own use would have been an embezzlement. This is a test of ownership.

After leaving Mr. Monaghan's office on the evening of February 7th, Jonathan P. Yerkes, on his way home, stopped at the house of his brother, John Yerkes, indorsed the check,

and gave it to his brother in payment of a debt which he owed him. This was done in pursuance of a previous parol agreement, by which John was to receive Jonathan's share of the money in the hands of the master. It was a parol assignment of the fund, consummated as soon as the check came into Jonathan's hands.

The plaintiffs, having obtained a judgment against Jonathan P. Yerkes, issued an attachment thereon on the same day that the settlement was made between Mr. Monaghan and the said Jonathan, which attachment was served upon the garnishees about eight o'clock, P. M. At that time there were no funds in the hands of either Mr. Monaghan or the bank, garnishees, belonging to Jonathan P. Yerkes. The attaching creditors could only attach his right; they stood precisely in his shoes. They could take what he could claim; nothing more. It cannot be contended successfully that as between Jonathan and his brother, John, the former could take this fund. He had made a parol assignment of it for a valuable consideration, and before any attachment was served, indorsed and transferred the check to his brother, and thus passed to him the legal title. The learned judge below correctly held that the attaching creditors acquired the rights of Jonathan P. Yerkes to the fund. But we have endeavored to show that he had no right to it. All his right passed to his brother by virtue of the parol assignment and the delivery of the check. The error into which the learned judge below fell was in holding that the check gave the payee no valid claim upon the fund, overlooking the fact that this was not the case of an ordinary check drawn against general funds of the drawer, but a check drawn against a special fund, to which the payee held the equitable title.

The judgment is reversed, and judgment is now entered against the National Bank of Chester County, garnishee, in favor of John Yerkes, one of the above-named defendants, for \$634.14, with costs.

CHECK, WHEREBY ASSIGNMENT OF FUND. — In view of the fact that this subject has been discussed at length in notes to *la re Franklin Bank*, 19 Am. Dec. 422 et seq., also *Seander & Co. v. Craig*, 96 Am. Dec. 132, and *Saylor v. Bushong*, 45 Am. Rep. 355, and for the further reason that very few cases have discussed the topic since those notes were written, no attempt will be made here to enter into an extended review of this much-vexed subject. On the contrary, this note will be confined to a reference to and grouping of the cases, which now, as then, maintain views directly contrary to one another. One class of cases asserts the doctrine that the drawing and delivery of a

check do not operate as an assignment, in any sense, of the drawer's rights as against the drawee, unless the check is in some way accepted by the drawee, and hence that as between the drawer and the payee or holder, the check does not operate as an assignment of so much of the fund as is drawn upon, or of the drawer's rights as against the drawee. In other words, that a check drawn and delivered to the person to whose order it is payable does not operate, without acceptance by the drawee, as an assignment of the sum for which it was given, although the drawer may have, or may have had at the time it was drawn, funds in the possession of the drawee of an equal or larger amount. There being no privity, express or implied, between the holder of the check and the drawee, such holder of the check in its original form can bring no suit on it against the drawee. In case of non-payment, the recourse of the holder is against the drawer and the indorser, if any. The drawer alone can bring suit to recover the funds against which the check was drawn, and ordinarily he only can maintain an action for failure to pay on presentment. He may revoke the check, and countermand its payment before acceptance, and if unaccepted, his death will operate as a revocation, and it seems that his insolvency has the same effect.

The notes above referred to, and the cases therein cited, show that this view of the law of checks is unanimously adopted by the courts of England, and the vast weight of American authority is also found to be in full accord with this rule. Among the cases supporting it are *National Bank v. Millard*, 10 Wall. 152; *National Bank v. Whitman*, 94 U. S. 343; *Dana v. Third Nat. Bank*, 13 Allen, 445; *Carr v. National etc. Bank*, 107 Mass. 45; 9 Am. Rep. 6; *Atina Nat. Bank v. Fourth Nat. Bank*, 46 N. Y. 82; 7 Am. Rep. 314; *Case v. Henderson*, 23 La. Ann. 49; 8 Am. Rep. 590; *Colorado Nat. Bank v. Boettcher*, 5 Col. 185; 40 Am. Rep. 142; *Griffin v. Kemp*, 46 Ind. 172; *National Bank v. Second Nat. Bank*, 69 Ind. 479; 35 Am. Rep. 236; *Harrison v. Wright*, 100 Ind. 515; 50 Am. Rep. 805, fully discussing the subject and citing and classifying the cases; *Merchants' Nat. Bank v. Coates*, 79 Mo. 168; *Dickinson v. Coates*, 79 Mo. 250; 49 Am. Rep. 228; *Coates v. Doran*, 83 Mo. 337 (these cases overruling several cases in the Missouri court of appeals holding a contrary view); *Creveling v. Bloomsbury Nat. Bank*, 46 N. J. L. 255; 50 Am. Rep. 417; *Duncan v. Berlin*, 60 N. Y. 151; *People v. Merchants' Bank*, 78 N. Y. 299; 34 Am. Rep. 532; *Risley v. Phoenix Bank*, 83 N. Y. 318; 38 Am. Rep. 421; *Veits v. Union Nat. Bank*, 101 N. Y. 563; *Saylor v. Bushong*, 100 Pa. St. 23; 45 Am. Rep. 353; *First Nat. Bank v. McMichael*, 106 Pa. St. 460; 51 Am. Rep. 529; *First Nat. Bank v. Shoemaker*, 117 Pa. St. 94; 2 Am. St. Rep. 649; *Purcell v. Allemon*, 22 Gratt. 739; *Benex Co. Nat. Bank v. Bank*, 7 Biss. 193; *Strain v. Cowdin*, 11 Nat. Bank. Reg. 156; *Rosenthal v. Mantin Bank*, 17 Blatchf. 318; *Moses v. Franklin Bank*, 34 Md. 574; *Attorney-General v. Continental Life Ins. Co.*, 71 N. Y. 325; 27 Am. Rep. 55; *Lunt v. Bank*, 49 Barb. 221; *Gammel v. Carmer*, 55 Mich. 201; *First Nat. Bank v. Gish*, 72 Pa. St. 14.

This doctrine has been lately approved by the supreme court of Alabama in *National etc. Bank v. Miller*, 77 Ala. 168, and reaffirmed by the supreme court of the United States in *Laclede Bank v. Schuler*, 120 U. S. 511, where the court said: "The question of how far and under what circumstances a check of a depositor in a bank will be considered an equitable assignment to the payee of the check of all or any portion of the funds or deposits to the credit of the drawer in the bank, is one which has been very much considered of late years in the courts, and about which there is not a unanimity of opinion. In this court, it is very well settled that such a check, unless accepted by the bank, will not sustain an action at law by the drawee against the

bank, as there is no privity of contract between them." In the later case of *Florence Mining Co. v. Brown*, 124 U. S. 391, the court said: "An order to pay a particular sum out of a special fund cannot be treated as an equitable assignment *pro tanto*, unless accompanied with such a relinquishment of control over the sum designated that the fund-holder can safely pay it, and be compelled to do so, though forbidden by the drawer. A general deposit in a bank is so much money to the depositor's credit; it is a debt to him by the bank, payable on demand, to his order, not properly capable of identification and specific appropriation. A check upon the bank in the usual form, not accepted or certified by its cashier to be good, does not constitute a transfer of any money to the credit of the holder; it is simply an order, which may be countermanded, and payment forbidden by the drawer at any time before it is actually cashed. It creates no lien on the money which the holder can enforce against the bank. It does not of itself constitute an equitable assignment." In the late case of *Pickle v. Muse*, 88 Tenn. 380-385, 17 Am. St. Rep. 900, the court reaffirmed this doctrine, and said: "This brings us to the question as to whether complainant can recover upon this check as against the bank. While the authorities are not agreed, yet the decided weight of opinion is, that the holder of a bank check cannot sue the bank for refusing payment, in the absence of proof that it was accepted by the bank, or that it has done some other act equivalent to and implying acceptance. This has been the uniform view of this court: *Planters' Bank v. Merritt*, 7 Heisk. 177; *Planters' Bank v. Keese*, 7 Heisk. 200; *Imboden v. Perrie*, 13 Lea, 504. We are unable to see any reason for disturbing the rule as heretofore declared by this court, especially as the decided weight of authority is in accord with our decisions."

The doctrine upon which this class of decisions is founded is well stated in the leading case of *National Bank v. Millard*, 10 Wall. 156, where Mr. Justice Davis said: "On principle, there can be no foundation for an action on the part of the holder, unless there is a privity of contract between him and the bank. How can there be such a privity when the bank owes no duty and is under no obligation to the holder? The holder takes the check on the credit of the drawer, in the belief that he has funds to meet it; but in no sense can the bank be said to be connected with the transaction. If it were true that there was a privity of contract between the banker and the holder when the check was given, the bank would be obliged to pay the check, although the drawer, before it was presented, had countermanded it, and although other checks drawn after it was issued, but before payment of it was demanded, had exhausted the funds of the depositor. If such a result should follow the giving of checks, it is easy to see that bankers would be compelled to abandon altogether the business of keeping deposit accounts for their customers. If, then, the bank did not contract with the holder of the check to pay it at the time it was given, how can it be said that it owes any duty to the holder until the check is presented and accepted?"

There is another class of cases, however, holding an entirely different doctrine. They proceed upon the ground of an implied promise by the bank to the check-holder, arising from the well-known usages of the banking business. They maintain that the drawing and delivery of a check operate as an equitable assignment *pro tanto* of the funds in the hands of the drawee, and give the holder the right to collect from him by suit. These cases, of course, determine that the check operates as an assignment as between the drawer and payee. Among these cases may be mentioned *Munn v. Burch*, 25 Ill. 35; *Brown v. Leckie*, 43 Ill. 497; *Fourth Nat. Bank v. City Nat. Bank*, 68

Ill. 399; *Union Nat. Bank v. Oceana Co. Bank*, 80 Ill. 212; 22 Am. Rep. 165; *Paynter v. State Bank*, 12 Rich. 518; 78 Am. Dec. 468; *Lester v. Ginn*, 3 Bush, 357; *Weinstock v. Bellwood*, 12 Bush, 139; *Roberts v. Corbin*, 26 Iowa, 321. This case seems to be overruled by *First Nat. Bank v. Dubuque etc. R'y Co.*, 52 Iowa, 378, 35 Am. Rep. 280, where the court determined that a draft on a general fund in the hands of the drawer not accepted is not an assignment of the fund.

The doctrine enunciated above has lately been affirmed in *Pease v. Lander*, 63 Wis. 20, 53 Am. Rep. 247-250, where the court said "that as between the drawer of a check and the holder thereof for value, the drawing and delivery of the check operate as an equitable assignment of the account or fund upon which it is drawn, and as a consequence such equitable assignment is binding upon the drawer, and he cannot arbitrarily stop payment or avoid it except for some good cause." And in the late case of *Nat. Bank of America v. Indiana Banking Co.*, 114 Ill. 483-491, the court said that "when a depositor draws a check on his banker who has funds to an equal or a greater amount, it operates to transfer the sum named in the check to the payee, who may sue for and recover the same from the depository. The transfer of the check carries with it the amount named in the check to each successive holder." To the same effect are *Ridgely Nat. Bank v. Patton*, 109 Ill. 479, and *Merchants' Bank v. Rittinger*, 20 Ill. App. 27, where the court decided that the assignment of a check carries with it the legal title to the drawer's deposit for the sum named.

There is still another class of cases which, without deciding the disputed question as to whether the drawing and delivery of a check for a part only of a general fund operate as an equitable assignment as between the drawer and the payee or not, or whether or not such act gives the holder any right to collect the amount of the check from the drawee by suit, still decide that a check drawn upon the whole or a part of a particular or specific fund, though unaccepted, operates as an equitable assignment *pro tanto* of such fund as between the drawer and payee, and gives the holder a right in equity to recover the amount from the depository: *Gardner v. National City Bank*, 29 Ohio St. 606; *Martin v. Brown*, 2 Story, 502; *First Nat. Bank v. Conter*, 3 McCrary, 9. A check drawn on a particular fund is operative as an assignment of the fund or the portion thereof covered by the check, and will make the drawee equitably answerable to the payee for a failure to comply with its terms; but a draft payable generally, and not specifying or referring to any particular fund, does not operate as an equitable assignment. And when the drawee refuses to accept such draft, or recognize any obligation as imposed upon him by it, although indebted to the drawer in a greater amount than that drawn for, and afterwards pays the drawer the amount of his indebtedness, the payee cannot hold him liable as upon an equitable assignment: *Bush v. Foote*, 58 Miss. 5; 38 Am. Rep. 310. In accord with this ruling are *Jones v. Pacific Wood etc. Co.*, 13 Nev. 359; 29 Am. Rep. 308, and *First Nat. Bank v. Dubuque etc. R'y Co.*, 52 Iowa, 378; 35 Am. Rep. 280.

WAGNER FREE INSTITUTE v. PHILADELPHIA.

[182 PENNSYLVANIA STATE, 512.]

CONSTITUTIONAL LAW.—Legislative charter is usually a contract; but such charter, when revocable at the will of the grantor, is only a *quasi* contract, and partakes more of the character of a license. To such charter the rule of the Dartmouth College case does not apply.

CONSTITUTIONAL LAW—REVOCATION OF CORPORATE CHARTER.—Under a constitutional provision giving the legislature power to alter or revoke any corporate charter whenever, in its opinion, the privileges granted become injurious to the citizens of the commonwealth, the legislature is the judge as to when such privileges become injurious.

CONSTITUTIONAL LAW—REVOCATION OF CORPORATE CHARTER.—Under a constitutional provision giving the legislature power to alter or revoke any corporate charter whenever, in its opinion, the privileges granted become injurious to the citizens of the commonwealth, a charter granted to a corporation, exempting its property from taxation, but granted subsequently to the adoption of the constitutional provision, is only a *quasi* contract, in the nature of a license, which the legislature may alter or revoke by general law whenever, in its opinion, such charter becomes injurious.

BILL to enjoin the defendants from taxing land conveyed to plaintiff by W. Wagner as a gift, and rented by plaintiff to various persons, the rent received being applied to the maintenance of the institute. Judgment for defendants, and plaintiff appeals.

George W. Biddle and W. W. Montgomery, for the appellant.

Charles F. Warwick and Robert Alexander, for the appellees.

MITCHELL, J. The legal question in this case is identical with that in *Wagner Institute's Appeal*, 116 Pa. St. 555; but in deference to the urgency of counsel for this worthy and deserving institution, we have examined the whole case anew. Briefly stated, the question is, whether the real estate not occupied by or annexed to the institute building itself, but the revenue from which is devoted to its support, is exempt from taxation.

The institute was chartered by a special act of assembly March 9, 1855, which it is conceded would not exempt the property now in question. But a supplementary act amending the charter, passed March 30, 1864, contained the following clause, under which the exemption is now claimed: "The cabinet collections and lot of ground on which it is erected, belonging to the said institution, with any gifts, bequests, or endowments, so long as the same shall be used for free lectures, shall be exempt from taxation." The question whether the

real estate in controversy is an endowment, within the sense of this clause, was discussed by our brother Green in 116 Pennsylvania State, 564, and need not be further enlarged upon.

But the case has been argued and may be confidently rested on broader grounds. Counsel have presented two questions, assuming that the real estate in this case is an endowment: 1. Can the state repeal the exemption? and 2. Has it done so?

Upon the first question, there can be no substantial doubt. The exemption can only exist by virtue of the amended charter of 1864. But this, of course, is subject to the legislative power, under the amendment of 1857, to the constitution, to alter, revoke, or annul any charter thereafter granted. Under the constitution of the United States and the decisions of the supreme court, a charter is ordinarily a contract; but a charter which is revocable at the will of the grantor is only a *quasi* contract, and approaches much more closely to the character of a license. To such a charter the rule of the Dartmouth College case does not apply, and the decisions are uniform to this effect. No question under the constitution of the United States, therefore, arises in this case.

But it is argued that the legislative right of revocation only exists when the privileges granted become "injurious to the citizens of the commonwealth," and that the legislature is not the final and absolute judge of what is so injurious. Expressions from the opinions of this court in several cases are cited in support of this argument, but none of the decisions, examined upon their facts, really sustain the contention of the appellant here. The strongest expression is found in *Commonwealth v. Pittsburgh etc. R. R. Co.*, 58 Pa. St. 26, where Sharswood, J., says: "That case [*Erie etc. R. R. Co. v. Casey*, 26 Pa. St. 287] must be considered as authority in this state for the position that the legislature is not the final judge of whether the *casus fœderis*, upon which the authority to repeal is based, has occurred." This language is quoted with approval by Gordon, J., in *Hays v. Commonwealth*, 82 Pa. St. 523, and this latter case, in turn, by the present chief justice, in *Williamsport Pass. R'y Co.'s Appeal*, 120 Pa. St. 12. But in *Commonwealth v. Pittsburgh etc. R. R. Co.*, 58 Pa. St. 26, the charter involved was granted before 1857, and by its terms limited the power of repeal to the contingency of "misuse or abuse of the privileges granted"; and it was of this provision that Justice Sharswood used the language quoted. The case itself turned on the railroad company's denial of any violation of

its charter since a condoning statute, and the admission of the truth of that defense by the commonwealth's demurrer. *Hays v. Commonwealth*, 82 Pa. St. 523, and *Williamsport Pass. Ry Co.'s Appeal*, 120 Pa. St. 12, decide only that the present constitution does not repeal charters previously granted; and the general language of the opinions is used with reference to the intent of the instrument, rather than to the power to repeal if the intention to do so were clear.

The language of the constitutional amendment of 1857 is, that the legislature may alter or revoke any charter whenever, "in their opinion, it may be injurious." The same language is repeated in the present constitution, article 16, section 10. Exemption from taxation is a subject of inherent public interest. It is a diminution of the supreme prerogative of the state to raise the revenue necessary to its existence. It is at all times a legislative question, and we do not see how the right of the legislature to determine whether, in any particular class of cases, an exemption is "injurious to the commonwealth" can be doubted; and by the first section of article 9 of the constitution, the legislature is imperatively restricted to dealing with it by general laws. We think it clear, therefore, that the legislature, under the authority reserved by the constitution of 1857, could at any time repeal the exemption in the plaintiff's charter, and do so by a general law.

We come, then, to the second question, Has the exemption granted to the appellant by the charter of 1864 been repealed? This would seem to be no longer open to argument. The act of April 8, 1873, P. L. 64, is entitled "An act to repeal all laws exempting real estate from taxation," and provides that "all real estate within this commonwealth shall be liable to taxation, . . . excepting only therefrom the classes of property specifically exempted from taxation by section 29 of the act of the 16th of April, 1838," as construed by the act of July 2, 1839, etc.; also, "all parsonages owned by any church or religious society, with the lands attached thereto, not exceeding five acres; . . . also, all lunatic asylums, alms-houses, poor-houses, houses of refuge, penitentiaries and asylums, schools and hospitals, supported by the appropriations annually made thereto by this commonwealth, together with the lands attached to the same; and also excepting and exempting from such taxation all charitable institutions founded by charitable gifts or otherwise, the chief revenues for the support of which are derived from voluntary contribu-

tions, together with the lands attached to the same; and all laws or parts of laws inconsistent with the provisions of this statute be and the same are hereby repealed." The classes of property specifically exempted by the act of 1838, referred to, are churches, etc., universities, colleges, academies, and school-houses, etc., "with the grounds thereto annexed"; and by the act of 1839 the ground so exempted shall be no more than "five acres of land, together with the improvements thereon, attached to all such religious congregations, universities, colleges," etc. The exemption of every class of institution in which the appellant could possibly be included is thus seen to be restricted, in all three of these acts, to the land annexed or attached to the building itself, and clearly, therefore, does not include property situated as the appellant's, which is the subject of this suit. The act of 1873 in express terms repeals all other acts granting exemptions inconsistent with its own provisions; and in *Northampton Co. v. Lehigh Coal etc. Co.*, 76 Pa. St. 461, this court declared that the object of the act was to repeal the large number of special acts upon the statute-book, exempting particular properties. "These special laws," says Sharswood, J., "had become a great evil. In the city of Philadelphia, houses and lots producing large revenues to the institutions to which they belonged, to the extent in value of more than a million dollars, were thus, by special law, relieved from their share of the local taxes, and the burden proportionally increased on the residue."

As the act of 1873 and the decision quoted are conclusive of the present contention, it is not necessary to go further than to note that no other authority for the exemption has been asserted. Article 9 of the constitution grants no exemption; it is restrictive only; and the act of May 14, 1874, P. L. 158, passed to carry out the intention of the constitution, in enumerating the "institutions of learning, benevolence, or charity" intended to be included, restricts the exemption to the institution itself, "with the grounds thereto annexed, and necessary for the occupancy and enjoyment of the same." We are unable, therefore, to perceive any ground upon which the appellant's contention can be sustained.

Decree affirmed.

CORPORATIONS.—CHARTERS.—Power of the legislature to repeal a corporate franchise: Extended note to *Miner's Bank v. United States*, 43 Am. Dec. 118-121, where the Pennsylvania doctrine is contrasted with the rule as laid down by other courts.

PAWLING v. HOSKINS.

[122 PENNSYLVANIA STATE, 517.]

NEGLIGENCE — BURDEN OF PROOF. — When the negligence of defendant is the ground upon which a recovery in damages is sought, the burden of proof is upon plaintiff. An exception exists in the case of injury to a passenger through the negligence of a common carrier, who has the burden of proof to show that the accident was not the consequence of his own fault, but was due to causes over which he had no control.

MASTER AND SERVANT — CONTRIBUTORY NEGLIGENCE. — Where a safely constructed trap-door is maintained in an imperfectly lighted hallway of a manufactory, as a necessary means for one of the employees to reach a portion of the building, and such employee has strict orders to keep it closed, while the other employees have full knowledge of its existence and use, the master is not guilty of such negligence as will make him liable to an employee who, knowing that such door has been lately used, and while passing rapidly along the hallway, falls through the opening and is injured in consequence of the failure of the other employee to close the door after using it. In such case the injured employee is guilty of such contributory negligence in failing to look and see if the door is open as will bar his right to recover.

MASTER AND SERVANT — NEGLIGENCE OF FELLOW-SERVANTS. — The engineer in charge of an engine which furnishes the power for a stationery manufactory is the fellow-servant of the foreman of the composing-room of the same, and the latter cannot recover damages for an injury received in consequence of the negligence of the former.

TRESPASS by the plaintiff, John W. Pawling, a foreman in the composing-room of the W. H. Hoskins Company, to recover for personal injuries alleged to have been received in consequence of the negligence of such company. Judgment for the plaintiff, and the defendants appeal.

Alfred Frank Custis, for the appellants.

A. S. Ashbridge, Jr., for the appellee.

WILLIAMS, J. Where the negligence of the defendant is the ground upon which a recovery in damages is sought, the burden of proof is on the plaintiff, and he must show the negligence of which he complains. There is a well-recognized exception to this rule in the case of common carriers. After the carrier has entered upon the performance of his contract to carry safely, if an injurious accident happens to or affects any of the means or appliances of carriage, whereby the plaintiff sustains injury, he is required to show only the happening of the accident, and the injury. The burden is then on the carrier to show that the accident was not the consequence of its own fault, or that of its employees, but was due to causes over which it had no control. With this exception, however,

the rule is uniform that the burden of proving the facts on which the right to recover rests is on the plaintiff.

In this case, the plaintiff charged in his statement that "through and by the negligence of the defendants" he was thrown down, and caused to fall into or through a trap-door on the premises of the defendants, and was thereby cut, bruised, wounded, etc. The proofs showed that the defendants were printers, engravers, and stationers at No. 927 Arch Street, in the city of Philadelphia. In the cellar was the engine, that furnished power to move the presses and machinery. On the first floor was a sales-room. The upper stories were used for work-rooms, and contained the presses and other machinery. The store was entered directly from the street. Access to the rest of the building was through a hall or passage-way not communicating with the store. From this hall the engineer descended to the cellar through the trap-door, which was cut for that purpose, and the compositors and other employees ascended to the stories above by means of a staircase. The trap-door was used only by the engineer, who was under strict orders from his employers to close it behind him whenever he passed through it. He was the first to enter the building in the morning, and the last to leave it at night. The plaintiff knew the location and use of the door, and passed it several times each day for six months or more before the accident. On the morning of November 28, 1887, the plaintiff came to his work as usual, and passing rapidly through the hall, fell into the opening at the trap-door. The engineer had passed into the building a few minutes before, and the evidence indicates that he was the only person who had done so prior to the plaintiff's arrival. He says he shut the trap-door behind him; but this is impossible, if, as the plaintiff alleges, it was open when he reached it.

But the question to be considered is, What did the defendants do or leave undone, in violation of their duty to the plaintiff? In what respect were they negligent? It cannot be said that they were negligent in permitting the plaintiff to pass through the hall without any knowledge of the existence of the trap-door, for he testifies that he knew all about its existence and use. There was no negligence in failing to instruct the engineer in his duty to keep the trap-door closed, for it appears in proof, and is not questioned, that such instructions were carefully given. There was no negligence in the manner of its construction. It was safely built, and when

closed, prevented the possibility of accident to those passing through the hall. There was no negligence in the fact of its existence, for it is conceded that it was a necessary means of access to the engine in the cellar, by which the machinery of the establishment was moved. By whose fault, then, was the accident made possible? Clearly, by that of a co-employee who neglected to close the trap-door behind him, notwithstanding the positive orders of his employers.

The learned judge of the court below seems to have entertained substantially the same view of the case, as appears by his answer to the defendants' fourth point. The point asked an instruction that "if the plaintiff knew of the existence of the trap-door in the floor of the hallway through which he had to go to reach his work in the building, and that this trap-door was opened each morning to permit the engineer to enter the cellar before other employees of the defendants reached the building in which plaintiff was working, then the plaintiff is assumed to have undertaken to run the risk of said trap-door being left open by the engineer, and the plaintiff is not entitled to recover." The learned judge answered: "This point I affirm. A man is not entitled to recover damages for the risk which he knows is before him in his path. In the case of danger, it is his duty to look out for it and avoid it." This covered the whole case. The plaintiff knew of the existence and use of the trap-door. He knew that the engineer by whom it was used reached the building a very few minutes before him, and it was his duty to be on the lookout. He was not. Because he was not, he fell into the opening. But leaving the subject of his own contributory negligence out of view, the negligence of which he must complain is that of a co-employee, which affords no ground for a recovery in this case.

Judgment is therefore reversed.

NEGLECTANCE—BURDEN OF PROOF.—The burden of proving negligence is cast upon him who alleges it: *Blanchard v. Lake Shore etc. R'y Co.*, 126 Ill. 416; 9 Am. St. Rep. 630, and note 637, 638. But in the case of actions against carriers for negligence, the *onus probandi* of want of negligence is upon the carrier: *Merchants' D. T. Co. v. Block Bros.*, 86 Tenn. 392; 6 Am. St. Rep. 847, and note.

FELLOW-SERVANTS, WHO ARE: *Murray v. St. Louis Cable etc. R'y Co.*, 98 Mo. 573; 14 Am. St. Rep. 661, and note.

MASTER AND SERVANT.—The master is not liable for injuries sustained by a servant from negligence of a fellow-servant, notwithstanding the latter was higher in authority than the one injured: *Wilson v. Dunreath etc. Co.*, 77 Iowa, 429; 14 Am. St. Rep. 304, and note 307, 308.

CONTRIBUTORY NEGLIGENCE. — One cannot recover damages for an injury which he might have avoided by the use of reasonable care: *Delaware etc. R. R. Co. v. Cadow*, 120 Pa. St. 559; 6 Am. St. Rep. 730; *Bloomburg Steam Co. v. Gardner*, 126 Pa. St. 80. Compare *Clough v. Hoffman*, 132 Pa. St. 525; *infra*.

CLOUGH v. HOFFMAN.

[126 PENNSYLVANIA STATE, 525.]

MASTER AND SERVANT — CONTRIBUTORY NEGLIGENCE. — A servant cannot recover damages from his master for injuries received in falling through a trap-door in the latter's mill, when he has provided a safe cover therefor, given orders that it be kept in place, and has had it nailed to the floor to prevent accident; for in the absence of evidence that it was left uncovered by the master, or with his knowledge, or that it had remained uncovered long enough before the accident for him to have known it in the exercise of reasonable care, no negligence can be imputed to him.

CASE to recover damages for personal injuries received in falling through a trap-door in defendant's mill, in consequence of the alleged negligence of defendant, by whom plaintiff was employed. The fourth assignment of error relates to the first point mentioned in the opinion. Judgment for the plaintiff. Defendant appealed.

John M. Broomall, for the appellant.

V. Gilpin Robinson and Horace P. Green, for the appellee.

WILLIAMS, J. This case was here one year ago, and is reported in 124 Pennsylvania State, 505. The questions to which our attention was then called are not now before us, but the plaintiff in error insists that there was no sufficient evidence of negligence to justify the submission of his responsibility for the accident complained of to the jury.

This question is raised by the first point of the defendant below, which asked the court to instruct the jury that "there being no evidence in this case that the lid of the well was left in an unsafe condition at the time of the accident by the defendant, nor that it was left in an unsafe condition by any one for such a length of time before the accident that the defendant ought to have known its condition, the defendant is guilty of no negligence, and the verdict should be in his favor." To this the learned judge responded in these words: "Now, gentlemen, to affirm this point would be to give you a binding instruction to find for the defendant. I decline to do that. I leave it for you to say whether the evidence is sufficient to

sustain the assumed facts mentioned in this point. If you find that they are, it is affirmed, and the evidence is for you." The assumed facts of which the prayer of the point was predicated were two in number: 1. That there was no evidence showing that the lid of the well was left in an unsafe condition at the time of the accident by the defendant; 2. That there was no evidence showing it to have been in an unsafe condition long enough before the accident to bring notice of its condition home to the defendant. Was there any evidence on these points?

The opening in the floor was shown to have been made as a means of access to a well under the building. There had been a pump in it at one time. This had been removed, and a trap-door or lid made to cover the opening, with cleats on the under side just fitting into the hole in the floor, to hold the lid in place. When the lid was in place, it was as strong as any part of the floor, and would sustain the weight of persons stepping or standing on it, without danger. The directions of the defendant were, to keep this opening closed by means of the lid which he had provided. Finding his employees careless in complying with his directions, he caused the lid to be nailed to the floor. It was afterwards forced off, and the opening again used as a means of access to the well, by lifting off the cover, drawing water for drinking, and then replacing the cover. From this glance at the testimony, it is clear that there was no evidence that the lid of the well was left in an unsafe condition by the defendant. He had provided a cover that was strong, that could not be moved except by prying or lifting it out of its place designedly, and he had given general and repeated directions that it should be kept in its place. He had even gone the length of having it nailed to the floor on one or two occasions, thus emphasizing his desire to guard against the possibility of accident. As to the first of the positions of the point, therefore, there was no evidence to submit to the jury.

Turning, now, to the second, we find no testimony showing that the cover was not in place on the morning of the accident, unless it can be gathered from that of the plaintiff himself. He says: "I just put my box of tools down, and stepped on the door; but I did n't know there was a door there at the time. I went down as far as this arm, and then I grabbed the spool with this hand." From this it would seem probable that some one had removed the lid to get water, and had gone away,

leaving it lying loosely over the hole, instead of fitting it into its place. This may have taken place, so far as the evidence shows, just before the plaintiff came upon the scene, and without even a possibility that the defendant could have had his attention drawn to the subject. The second fact or position assumed in the point was therefore also correct, and the legal conclusion that followed should have been affirmed.

Negligence ought not to be imputed to an employer because he is able to pay damages, nor because the injury to his employee is one that excites our sympathy. It must be proved like any other cause of action, and unless there is more than a *scintilla* of proof, the question should not be submitted to a jury. Whether the unfortunate injury to the plaintiff is attributable to his own negligence or to that of a co-employee is a question of no practical moment, inasmuch as the defendant can be held liable only for his own failure in duty towards his employees. The learned judge of the court below seems to have been much of this opinion, but to have regarded the award of a *venire facias de novo*, when this case was here before, as indicating the judgment of this court that there was evidence to go to a jury on the question of the employer's negligence. But the questions then brought to our attention were,—1. Whether the danger of falling into the well was one of the risks incident to the plaintiff's employment; and 2. Whether the defendant was liable for the injury, if it resulted from the negligence of a co-employee. These were therefore the only questions upon which an opinion was expressed at that time. Now, however, our attention is drawn to the state of the evidence by the point and answer we have considered, and, after examination, we are satisfied that there was no proof of any act of omission or of commission by the defendant in disregard of his duty as an employer. There was nothing for a jury to pass upon, and the point embodied in the fourth assignment of error should have been affirmed.

Judgment reversed.

MASTER AND SERVANT — CONTRIBUTORY NEGLIGENCE. — Where a safely constructed trap-door is maintained in an imperfectly lighted hallway in a factory, as a necessary means for one of the employees to reach a portion of the building, and the employee is under orders to keep the door closed, the other employees having knowledge of its existence and purpose, the master is not liable to an employee who, knowing that the door has recently been opened, is injured by falling through it: *Pauling v. Hoskins*, 132 Pa. St. 617, ante, p. 617.

ESTATE OF BECK.

[133 PENNSYLVANIA STATE, 51.]

EXEMPTIONS — CONDITION THAT LEGACY SHALL BE EXEMPT. — A legacy bequeathed by a testator upon the express condition that while in the hands of his executor it shall not be liable for the debts of the legatee, but shall be paid directly to him by the former, without diminution, is valid, and not subject to execution by the judgment creditor of the legatee while in the hands of the executor.

J. W. Moyer and James Ryon, for the appellant.

G. H. Gerber, for the appellee.

PAXSON, C. J. Elizabeth Beck, the testator, in and by her last will and testament gave to her step-daughter, also named Elizabeth Beck, a one-fourth interest in her estate, upon the following condition: "And whereas, the said Elizabeth Beck was unfortunate in business transactions, whereby she became indebted, part of which still remains unpaid, and having no means to pay the same, now, it is my will that the above equal share in my estate, as well as the specific bequest given to her, are given to her expressly upon condition that they shall not be liable to be attached or seized for the debts or moneys which said Elizabeth Beck may owe at the time of my decease, but that the whole amount of her share shall be paid directly to said Elizabeth Beck by my executor, without diminution for the payment of her said indebtedness."

The share aforesaid has not yet been paid to the said legatee, for the reason that the appellant, who held a judgment against her, attached the fund in the hands of the executor. The learned court below held that the attachment would not bind the fund in the hands of the executor, and awarded it to the legatee. From this decree, the attaching creditor has appealed.

No one doubts that it was competent for the testator to have placed this fund forever beyond the reach of the creditors of her legatee by creating a trust for that purpose. This she has not done, and the question which arises is, whether she has protected the fund in its transit from the executor to the legatee. That she had a right to do this must be conceded. Has she done so? We may dismiss from the case the learning about vested and contingent legacies. This was not, as was assumed by the learned counsel for appellant, an absolute gift of the property. It was a gift upon the express condition that, in the hands of her executor, it should not be liable to the debts of the legatee, but should "be paid directly to the

said Elizabeth Beck by my executor, without diminution for the payment of her said indebtedness." The executor was thus clothed with an express trust in regard to this share.

It is true, the trust would end the moment the money was paid to the legatee; but during the transit, while the money remained in his hands, it was as much protected from creditors as if a separate trust had been created for that purpose. It was the right of the testatrix to say that her estate should not go to pay her step-daughter's creditors. She has said so as emphatically as language can express it, for the time that the money remains in the hands of her executor. Does the fact that she did not protect it further, by raising up another trustee of the fund after it left the executor's hands, destroy the trust she did create, and nullify the positive directions of the will that it should not be attached in transit? Why shall the will of the testator be defeated in this respect? She had a right to do what she willed with her own. The creditors of her legatee had no claim upon her estate; and when she directed that the share should be paid to her step-daughter, and not to the creditors of the latter, who shall gainsay her? The creditor is not injured, and has no right to complain.

I have not discussed the authorities, because we have no case which precisely covers this; but upon reason and analogy to the decisions we have, this case must be affirmed.

The decree is affirmed, and the appeal dismissed, at the costs of the appellant.

EXECUTIONS—DEVISES AND BEQUESTS. — A devise or bequest of a beneficial life estate so as to secure its enjoyment to the beneficiary, without making it alienable by him, or subject to the claims of his creditors, may be valid: *Smith v. Towser*, 69 Md. 77; 9 Am. St. Rep. 398, and especially note 404-408, in which is discussed the validity of trusts providing that the property shall go to the beneficiaries to the exclusion of their alienees or creditors. Where a testator devised realty in trust for his son, and directed the trustee to pay the income to the son at certain times "on his receipt therefor, without the son's having any power to sell, assign, or pledge the same previous to the payment thereof to him," it was decided that neither the accrued income in the trustee's possession, nor the income accruing, could be disposed of by the son, or attached by his creditors for debts: *Partridge v. Cusender*, 96 Mo. 452. So where A devised to T, in trust for his three sons, B, C, and D, "with power in my three sons to use and enjoy, equally, the rents, issues, and profits thereof during their natural lives," his intention being, as expressed, "to secure to my children a certain annual income beyond the accident of fortune and bad management on their part, and with this end in view, to take away from them the power of disposing of the same, or of creating any liens thereon, or of making the same liable in any way for their debts," the devise was valid, as was the restriction placed upon it: *Lampert v. Haydel*, 96 Mo. 439.

PEPPER v. CAIRNS.

[123 PENNSYLVANIA STATE, 114.]

AGENCY. — DECLARATIONS OF ALLEGED AGENT are not admissible to establish the agency.

DOUBLE AGENCY — WHO MUST LOSE BY HIS EMBEZZLEMENT. — If a person acts as agent for a borrower in negotiating a mortgage loan and in receiving, handling, and applying the money, and for the lender in passing upon the sufficiency of the security and in delivering the executed mortgage, and he, after receiving the money, embezzles it, the borrower is liable for the mortgage debt, although the check for the amount of the loan was drawn upon the delivery of the mortgage, to the order of such agent.

SCIRE FACIAS by Sally N. Pepper, surviving trustee, against John Cairns, upon a mortgage executed by him to J. D. Sergeant and Sally N. Pepper, trustees. Said Sergeant, one of the mortgagees, had resigned as trustee before this suit was brought. Judgment for plaintiff, and defendant appeals.

M. J. O'Callaghan, for the appellant.

S. E. Megargee and Joseph M. Pile, for the appellee.

MITCHELL J. This case belongs to that unfortunate class in which one of two innocent parties must suffer from the fraud of a third; and it is also an illustration of the evils of the practice, so constantly reprobated by courts, but apparently so inveterate in business, of the same person being employed as agent by separate parties whose interests are or at any moment may become adverse. The legal principles by which such controversies are to be settled are perfectly clear, but require much care in their application.

The essential facts in this case are not really in dispute. The appellant, Cairns, desiring to borrow money upon a mortgage of his houses, went to Ruhl for the purpose of getting it. Ruhl, who was a conveyancer and real estate agent, wrote to Sergeant, the trustee of several estates from whom Ruhl had got money on previous occasions, naming the amount wanted, describing the property, its improvements, assessed value, etc., and asking, "Shall I take it, and for whose account?" Just what answer was made to this letter does not appear, except briefly in the testimony of Sergeant that he "took the mortgage for the Pepper estate," and by the fact that Sergeant drew his check as trustee of the Pepper estate to the order of Ruhl for the amount required, six thousand five hundred dollars, and received from Ruhl the mortgage in suit. Ruhl used three thousand five hundred dollars of the money properly in

the extinguishment of a prior mortgage on the property, but embezzled the rest, and the question now to be decided is, Upon which party shall the loss fall? Ruhl unquestionably was, to some extent, the agent of both parties, and we are required to look closely into the facts to discover in which capacity he did the fraudulent act. Clearly, at the inception of the transaction, he was the agent of Cairns. It was an application for money, and made on behalf of Cairns. But more than this, what was to be done with the money when obtained, and by whom? Cairns himself says the prior encumbrances were to be paid off and satisfied, and clearly, again, this was to be done by Ruhl, for that was in the line of his business as a conveyancer, and Cairns so left it to him, without even an inquiry for a period at least of months.

On the other hand, for what purposes was Ruhl the agent of Sergeant? Certainly, for the examination of the property, the title, etc. If the property should prove an inadequate security, or if prior judgments or other encumbrances should cut out this mortgage, then the estate would have to bear the loss, for they took the risk of Ruhl's attention to this part of the transaction. But is there any evidence of Ruhl's further agency for the plaintiff? This was the pinch of the case, and on this the learned judge below ruled it. The evidence is very briefly reported in the bill of exceptions, but the most careful examination of it fails to show that Ruhl's agency for the plaintiff extended beyond his duties as a conveyancer in the examination of the titles, etc. The defendant endeavored strenuously to show that Ruhl was the general agent of Sergeant, and had handled the money of several estates as such; but the only competent evidence on the subject was the testimony of Sergeant, and that flatly denied the agency. Ruhl, he says, "never represented me, or the estate, in investing money. . . . If Ruhl had a mortgage which he thought was a desirable investment, he would submit to me a memorandum, . . . and I would examine and approve or disapprove of it." It is clear that Sergeant transacted the business of the estate himself, retained his own judgment as to each investment, and left only the details of conveyancing to Ruhl. His testimony shows no agency beyond this point, and there is no other evidence in the case. Nothing is better settled than that agency cannot be proved by the declarations of the alleged agent, and the offers in the first and second assignments of error amount to no more than such declarations.

It is urged that Sergeant's act in drawing his check to the order of Ruhl, and not to Cairns, was negligence, and that, on the principle that he who put into the fraudulent hand the means of perpetrating the fraud should bear the loss, Sergeant or his principal should be responsible for Ruhl's act. But this is a misapplication of the principle. The means of committing the fraud may as well be said to be the mortgage, executed by Cairns and left with Ruhl, and by him delivered in exchange for the check. As already seen, Ruhl was Cairns's agent in the application for the money, and was to continue his agent in the use to be made of it. When he brought the mortgage, fully executed, to Sergeant, the latter was justified in paying for it on delivery. He might have paid for it in cash, and his payment by check to Ruhl's order was not different in effect.

The case turned upon the question of agency, which the double capacity of Ruhl required to be defined with extreme care. The whole evidence not only fails to show that Ruhl was Sergeant's agent in handling the money, but on the contrary, shows clearly that he received it as agent for Cairns, and in that capacity embezzled it. The learned judge was therefore right in directing a verdict for the plaintiff.

Judgment affirmed.

In *Sergeant v. Martin*, 133 Pa. St. 122, the court arrived at a different conclusion from that pronounced in the principal case, although the facts were in many respects similar, and the parties, with the exception of a different mortgagor, the same. In *Sergeant v. Martin*, 133 Pa. St. 122, Ruhl, the same conveyancer and real estate agent, applied to Sergeant, on behalf of Martin, for a mortgage loan, the money to be used in satisfying a prior mortgage, in favor of one Baird. Sergeant agreed to make the loan, and gave Ruhl a check for the money. Sixteen days afterwards, Martin executed the mortgage and delivered it to Ruhl, who had it recorded. Ruhl embezzled the whole amount of the mortgage loan. In the action on the mortgage, each of the parties thereto denied that Ruhl was his agent to handle the money, while the evidence tended to show that the mortgagee paid it to the agent, relying upon his integrity and financial responsibility, without inquiring of him whether the mortgagor had authorized him to receive it or not. Upon this state of facts, the court below refused to give the jury binding instructions to find for plaintiff, the mortgagee. The jury returned a verdict for defendant, upon which judgment in his favor was rendered, and on appeal, the court affirmed the ruling of the lower court and also the judgment.

The distinction between the cases is, that in *Sergeant v. Martin*, 133 Pa. St. 122, Sergeant paid the money to Ruhl prior to the execution or delivery of the mortgage, and while the latter had nothing to indicate his authority to represent Martin in receiving the money, while in *Pepper v. Cairns*, 133 Pa. St. 114, *ante*, p. 114, Ruhl brought to Sergeant the mortgage executed by

Cairns, and placed in his hands for delivery, and Sergeant paid him the money upon receiving the mortgage. Ruhl's possession of the mortgage justified Sergeant in assuming that he was the authorized agent to receive the money when he delivered the mortgage.

AGENCY — DECLARATIONS OF AGENT TO SHOW AGENCY. — The declarations of an agent cannot be received to establish his agency: *Kane v. Barstow*, 42 Kan. 465; 16 Am. St. Rep. 490, and note; *Omaha etc. Co. v. Tabor*, 13 Col. 41; 16 Am. St. Rep. 185, and note.

COMMONWEALTH v. WHITE.

[188 PENNSYLVANIA STATE, 182.]

CRIMINAL LAW. — ROBBERY IS THE FELONIOUS AND FORCIBLE TAKING, from the person of another, of goods or money of any value, by violence and putting him in fear; and any instruction which omits the felonious intent from the definition of the crime is erroneous.

CRIMINAL LAW — ROBBERY. — VALUE OF PROPERTY TAKEN may be considered by the jury under an indictment for robbery, for the purpose of determining the intent with which the act was committed. The taking of a pinch of tobacco, with no felonious intent, but as a practical joke, is not robbery.

Thomas F. McCourt and F. J. Fitzsimmons, for the appellant.

H. M. Edwards, district attorney, and *C. Comegys*, for the appellee.

PAXSON, C. J. The defendant was indicted in the court below for the crime of highway robbery. The proof was, that he took a chew of tobacco from a boy, by force. The jury convicted him of robbery. The court below sentenced him to pay a fine of one hundred dollars, and to undergo an imprisonment in the county jail for one year.

Complaint is made in the first three assignments that the learned judge below erred in his instructions to the jury as to what constituted the offense of robbery. He said: "At common law, robbery is defined to be the taking of any property from the person of another by force": See first assignment. The same definition, varied slightly in form, is to be found in those portions of the charge embraced in the second and third assignments. The definition given by the learned judge is inaccurate. What he defines as robbery is at most a trespass, and might not even amount to that. Robbery, at common law, is "the felonious and forcible taking, from the person of another, of goods or money to any value, by violence and putting him in fear": 4 Bla. Com. 242. The learned judge has

omitted the very *gravamen* of the offense, viz., the felonious intent.

We also think it was error to instruct the jury, under the circumstances, that "for the purposes of this case, and for the purpose of dealing with the property, you have nothing to do or say about the value of the property." It is very true that robbery may be committed of a penny as well as of a pound, but to say that the jury should give no consideration to the value of the property, for any purpose, was error. They had a right to take it into consideration, in considering the intent with which the act was committed. If it was not done with a felonious intent, it was not robbery; if it was intended as a practical joke, which is at least probable, it was not robbery. And the jury might well have come to the conclusion, had they been properly instructed, that the taking of a pinch of tobacco, of no appreciable value, precluded the idea of a felonious intent.

The main defense upon the trial below was, that the whole affair was a joke. The learned judge does not appear to have referred to this in his charge. On the contrary, he stated in his rulings upon the testimony that "it makes no difference whether the prosecutor thought it a joke or not." It is very true that a highway robbery cannot be turned into a joke. It is equally true that a mere joke cannot be turned into a highway robbery, and any evidence upon this point should have been submitted to the jury. The defendant was charged with a grave offense; one of the high grade of felonies, triable, exclusively in the oyer and terminer, and which at one time was punished with death. The defendant committed a rude and improper act, one that might fairly have subjected him to a prosecution for assault and battery; but the case lacks every element of a felonious intent. Speaking for myself, I would not, as a trial judge, sustain a conviction of robbery upon such flimsy evidence as was developed in this case; and I cannot but think that had the jury been adequately instructed upon the law, they would have reached a different conclusion.

The judgment is reversed, and a *venire facias de novo* awarded.

ROBBERY — WHAT CONSTITUTES THE OFFENSE. — As to what constitutes robbery, and the various elements of the offense, see *State v. Calkoun*, 72 Iowa, 432; 2 Am. St. Rep. 253; note to *State v. McCune*, 70 Am. Dec. 178-191.

ROBBERY — EVIDENCE. — For what purpose the value of the property taken may be shown, in prosecutions for robbery, see note to *State v. McCune*, 70 Am. Dec. 180.

RHODES v. DAVIDHEISER.

[123 PENNSYLVANIA STATE, 226.]

WATERS — DIVERSION OF SURFACE WATER. — A land-owner has no right to obstruct a natural watercourse on his land in which the surface water collecting thereon is accustomed to flow, and to construct ditches from it by means of which such water is discharged upon the lands of an adjoining owner, where it is not accustomed to flow, to his injury.

WATERS — DRAINAGE — DIVERSION OF SURFACE WATER. — An upper owner may improve and drain his land for agricultural purposes or the like, and in so doing, may increase the flow of surface water in the natural channel for it; but if he diverts it from such channel, and creates a new course, by which it is discharged upon the lower proprietor at another place, he must answer for the damages caused by the diversion.

CASE to recover damages for the washing of surface water upon the land of plaintiff, who recovered judgment, and defendant appeals.

H. Willis Bland, for the appellant.

William Kerper Stevens, for the appellee.

McCOLLUM, J. For convenience' sake, we refer to the parties as they appear on the record in the common pleas.

It is established by the verdict of the jury that the defendant obstructed a watercourse or channel on his farm, in which the surface water collected thereon was accustomed to flow, and that he constructed ditches from it by means of which the water was discharged upon the land of the plaintiff, to his injury. An examination of the evidence has satisfied us that it justified the verdict, and we have only to inquire whether the court committed any error in the instructions. It is essential to a correct appreciation of these, to consider the issue raised by the pleadings, and the general scope of the proofs submitted by the parties.

It was affirmed by the plaintiff, and denied by the defendant, that the latter had diverted the surface water on his farm from its natural course, and caused it to flow upon the land of the former adjoining the division line between them. The testimony described the condition of the defendant's farm, and how and where the water, gathered upon it from rains and melting snows, had been discharged for sixty years preceding the injury complained of. It authorized a finding that prior to July 14, 1886, this water had not descended or been cast upon the land of the plaintiff, but that it had flowed in a

channel on the defendant's farm, near the division fence, and through a culvert into the river; that the defendant, by placing obstructions in this channel, and cutting ditches or drains from it, had caused the water to flow upon the land of the plaintiff, to his injury.

The material question for the jury, under the pleadings and the proofs, was, whether the defendant had turned the water from its natural course upon his own farm into the land of the plaintiff; and the charge of the learned judge, applied to this issue, was free from substantial error. It related to the diversion of water from the course which nature had provided for it, and not to an increased flow of water in its natural channel, caused by the improvements and drainage required by good husbandry. Indeed, the defendant's criticism of the charge is based on decisions in other states which are in clear conflict with our own well-settled rule on this subject. This rule is defined in Washburn on Easements, 3d ed., 450, where the learned author says: "It may be stated, on general principles, that by the civil law, where the situation of two adjoining fields is such that the water falling or collected by melting snows and the like upon one naturally descends upon the other, it must be suffered by the owner of the lower one to be discharged on his land, if desired by the owner of the upper field. But the latter cannot, by artificial trenches or otherwise, cause the natural mode of its being discharged to be changed, to the injury of the lower field, as by conducting it by new channels, in unusual quantities, onto the particular parts of the lower field." The owner of the upper field may improve and drain it for agricultural purposes or the like, and in so doing, may increase the flow of water in the natural channel for it; but if he diverts it from this channel, and creates a new course, by which it is discharged upon the lower field at another place, he must answer for the damages caused by the diversion.

The rights and duties of the proprietors of adjoining lands, with reference to the water collected upon them from rain and melting snows, were so carefully considered and defined in *Kauffman v. Griesemer*, 26 Pa. St. 407, 67 Am. Dec. 437, and in *Martin v. Riddle*, 26 Pa. St. 415, that an extended discussion or restatement of them in the present case is unnecessary. The doctrine of these cases was approved and applied in *Miller v. Laubach*, 47 Pa. St. 154, 86 Am. Dec. 521, and in *Hays v. Hinkleman*, 68 Pa. St. 324; and it was enforced by

the learned judge in his charge to the jury on the trial of this issue.

Judgment affirmed.

WATERS — DIVERSION. — The dominant owner may drain his land of the water falling upon it, by means of tiles, into a natural channel upon the land, through which it is discharged upon the servient estate: *Vannest v. Fleming*, 79 Iowa, 638; 18 Am. St. Rep. 387; but he cannot, by artificial means, collect the waters of low places upon his premises, and cast them upon the lower lands in a body, to the injury thereof: *Gregory v. Bush*, 64 Mich. 37; 8 Am. St. Rep. 797; although by so doing he may materially increase the value of his own land for the purposes of husbandry: Note to *Martin v. Jett*, 32 Am. Dec. 125 et seq. Compare *Rowe v. St. Paul &c. R'y Co.*, 41 Minn. 384; 16 Am. St. Rep. 706, and particularly note 710.

KERSEY v. SCHUYLKILL RIVER EAST SIDE RAIL-ROAD COMPANY.

(186 PENNSYLVANIA STATE, 234.)

EMINENT DOMAIN — MEASURE OF DAMAGES. — The proper measure of damages for the taking of land by eminent domain for railroad use is the depreciation in the market value of the property caused by the location and construction of the road. This is usually shewn, in the ordinary case, by the opinion of witnesses conversant with the property, and the selling price of land in the vicinity. This, however, does not exclude other or better methods of proof; and evidence of elements of disadvantage, and of burden imposed, as the direct result of the location of the road, are admissible, as forming a basis for the computation of damages.

EMINENT DOMAIN — ELEMENTS OF DAMAGE. — In estimating damages to property taken by eminent domain for railroad purposes, whatever injuriously affects the property as the direct and necessary result of the location of the road upon it may be considered.

EMINENT DOMAIN — MEASURE OF DAMAGES. — Where the appliances of a lessee, essential to the carrying on of his business, are destroyed by a railroad company in the exercise of the right of eminent domain, evidence of the amount of the lessee's necessary expenditure in reconstructing such appliances for continuing his business, and the increased expense, and loss attendant thereon, is admissible in estimating damages, not as specific items of claim, but as affecting the market value of the leasehold.

ACTION to recover damages for the taking of property under the exercise of the right of eminent domain. Judgment for plaintiff, and defendant appeals.

Thaddeus L. Vanderslice and Lewis C. Cassidy, for the appellant.

Joseph L. Caven, for the appellee.

McCOLLUM, J. No complaint is made by the defendant company of the instructions to the jury on the question of damages, and our inquiry is limited to alleged error in the admission of evidence.

The plaintiff was the lessee of a wharf property on the Schuylkill River, in Philadelphia, extending from the river to Twenty-fourth Street. It was leased to him as a coal wharf and yard. Upon it he carried on the business of receiving, storing, and delivering coal for other parties, and of receiving, storing, and selling coal and sand on his own account. The appliances used in the business, and necessary to carry it on, belonged to him.

In January, 1886, the defendant company entered and located its road upon the demised premises, appropriating for that purpose a strip of land sixty feet in width, and dividing the property into two parts. The sheds, runs, and other appliances, indispensable to the business for which the property was leased, were partially destroyed by this action of the company, and the construction of new ones, adapted to the changed condition, became necessary in order to continue the business. A bridge, with a single span of sixty-eight feet, and an elevation of twenty-one feet above the railroad tracks, and a derrick, sheds, and runs of a corresponding height, were required. The company recognized the necessity for these appliances as the direct consequence of the location of its railroad, and admits that it promised the plaintiff to construct them, but excuses its non-performance on the ground that it could not agree with him as to the details of the work. In other words, the plaintiff wanted better structures than the company was willing to build, or considered necessary, in view of the probable duration of his leasehold. It was contemplated by the parties that the business should be continued by the plaintiff, and that he should have, as far as practicable, the same facilities for carrying it on that he had before enjoyed. It was the only business which his lease allowed him to establish there, and if he abandoned it, his leasehold was worthless, because he could not sublet or sell it without the consent of his lessor. The company, failing to provide the facilities it conceded he was entitled to, and had promised he should have, he constructed such appliances as were necessary for the continuance of the business as it existed before the location of the railroad. The increased height of the structures increased the cost of raising the coal, and the breakage and waste in handling it.

This additional expense and loss, together with the cost of the new appliances, he was allowed to prove on the trial of this issue. The company objected to this evidence, and now contends that the court erred in admitting it.

It is well settled that the proper measure of damages is the depreciation in the market value of the property caused by the location and construction of the railroad. But the elements to be considered in the ascertainment of this depreciation are as varied as the properties affected and the uses to which they are applied. A specification of all these elements is impossible, because they cannot be anticipated, and many of them remain to be developed in the course of the litigation consequent upon the taking of property by eminent domain. In the ordinary case of the appropriation of land for railroad purposes, the opinions of witnesses who are conversant with the property, and the general selling price of land in the vicinity, are received on the question of its value, unaffected by the road, and its value as affected by it. But this is not exclusive of other, and in some cases better, methods of proof. It may be stated as a general principle, applicable to cases of this sort, that whatever injuriously affects the property as the direct and necessary result of the location of the road upon it may be considered in the assessment of damages.

In this case, the estate of the plaintiff was limited to a particular use. Its enjoyment, in accordance with the terms of its creation, required that the appliances which had been rendered useless by the entry of the defendant company should be reconstructed at an elevation which increased the cost of raising and storing the coal, and increased the breakage and waste in handling it. We think these matters were properly received in evidence as descriptive of the injury inflicted, and the burden imposed on the property by the occupation of it for railroad purposes, and that they were for the consideration of the jury, not as specific items of claim, but as affecting market value. The specifications of error are dismissed, and the judgment is affirmed.

EMINENT DOMAIN — COMPENSATION FOR TAKING LAND. — As to what may be considered in awarding damages to an owner for the condemnation of his land for railway purposes, see *Currie v. Waverly etc. R'y Co.*, 52 N. J. L. 381, *ante*, p. 452, and note; note to *Sheehy v. Kansas City C. R'y Co.*, 4 Am. St. Rep. 399-405; note to *Ohio etc. R'y Co. v. Wachter*, 5 Am. St. Rep. 537-540.

FIRST NATIONAL BANK v. FISKE.

[183 PENNSYLVANIA STATE, 361.]

USAGE, EFFECT OF, AS EVIDENCE. — A usage, if known to the parties to a transaction to which it relates, is obligatory, and unless excluded by the terms of the contract, enters into and is regarded as part of it, as much as though it had been written therein. It is admissible to add incidents to the contract not inconsistent with its terms, and to ascertain the intention of the parties in reference to matters about which the contract is silent, unless it is unreasonable or in conflict with positive law.

ASSUMPSIT on a statement of a claim to recover damages for the refusal of the defendants, Louis S. Fiske and Company, to honor drafts drawn upon them by one J. R. Reid, and discounted by the plaintiff by virtue of a letter written by defendants to plaintiff. Defendants filed an affidavit of defense, which the court considered insufficient, and gave judgment for plaintiff. Defendants appealed.

John G. Johnson and Frank P. Prichard, for the appellants.

Alfred I. Phillips, J. Levering Jones, and Hampton L. Carson, for the appellee.

McCOLLUM, J. The defendants were engaged in the business of receiving and selling wool on commission in the city of Philadelphia, and James R. Reid was a shipper of wool, doing business at Butte, Montana. On May 23, 1887, the defendants wrote to the plaintiff as follows: "We expect to have some business with Mr. James R. Reid when the wool season opens, in which case we will honor his drafts with bill lading attached." On August 12, 1887, the plaintiff cashed Reid's draft on the defendants for \$4,007.80, with bill of lading attached for 22,285 pounds of wool, shipped by Reid to defendants at Philadelphia, and on the next day a like draft for \$2,752.97, with a like bill of lading attached for 14,951 pounds of wool. The defendants refused to honor these drafts, or to receive the wool described in the bills of lading attached, on the ground that Reid, in drawing drafts for these amounts, had exceeded his authority. The drafts, with the bills of lading attached, were returned to the plaintiff, and at Reid's instance, the bills of lading were forwarded to Justice, Bateman, & Co., wool merchants in Philadelphia, who had them indorsed by the consignees, delivered them to the carrier, received the wool described in them, and sold it in the market for its full value. The proceeds of this sale were received by the plaintiff, and were \$1,430.82 less than the amount called

for by the drafts. This action was brought to recover the difference.

The rights of the parties depend on the proper construction of the defendants' letter. The plaintiff contends that it constituted an undertaking on their part to honor all drafts which Reid might draw upon them, with bill of lading attached, without regard to the value of the consignment.

It is averred in the affidavit of defense that the plaintiff knew that the business referred to in this letter was the shipping of wool for sale on commission; that it was a usage of the trade for the shipper, when he consigned the wool to his factor, to draw on the latter for any amount not exceeding three fourths of the value or selling price of the wool at the time of its arrival at the place of its destination, and for the factor to make advances on the wool by paying these drafts. It is further averred that "it was understood by the plaintiff that the drafts to be honored by the defendants were to be honored on the security of the wool, bills of lading for which were attached to the drafts, and were not to exceed in amount the customary advances on such wool."

A usage, if known to the parties to a transaction to which it relates, is obligatory, and unless excluded by the terms of the contract, enters into and is regarded as a part of it, as much as though it had been written therein: *Stultz v. Dickey*, 5 Binney, 287; 6 Am. Dec. 411; *Hursh v. North*, 40 Pa. St. 241. It is admissible to add incidents to a contract which are not inconsistent with its terms, and to ascertain the intention of the parties in reference to matters about which the contract is silent: *Clarke's Browne on Usages and Customs*, 167. The usage described in the affidavit is not unreasonable, or in conflict with positive law. It does not contradict the terms of the instrument on which the plaintiff relies, but it explains them, and gives effect to the intention of the parties. The letter of the defendants must be read in the light of the usage known to the parties, and applicable to the transaction between them. When so read, it is fatal to the plaintiff's claim for the overdraft. We think the affidavit presents a good defense to the action.

Judgment reversed, and *procedendo* awarded.

USAGE, EVIDENCE OF, WHEN PROPERLY RECEIVED. — Evidence of usage is admissible to apply a written contract to the subject-matter of an action, and to give effect to the language of a contract as it was understood by those who made it: *Smith v. Cleve*, 114 N. Y. 190; 11 Am. St. Rep. 627, and note 632, 633.

ESTATE OF TOMLINSON.

[133 PENNSYLVANIA STATE, 245.]

WILLS, VALIDITY OF, WHEN WRITTEN OR CANCELED IN LEAD PENCIL. —

A will wholly written in lead pencil is as valid as if written in ink; and the cancellation of legacies in lead pencil, though in a will written in ink, may be as final and conclusive as to the intent of the testator as if made in ink.

WILLS. — CANCELLATION IN LEAD PENCIL, of bequests in a will written in ink, and found in a place of safe deposit after the testator's death, is as final and binding as though made in ink, and cannot be regarded as deliberative merely, although a paper was also found in the testator's box in a bank, containing a list of the legatees as they were named in the will, with all the legacies canceled in pencil that were so canceled in the will, except one, in which the name was canceled, but not the amount. In such case, the paper found in bank will be presumed to be the testator's deliberative memorandum, which he made final by the cancellation in the will.

APPEAL from a decree of the orphans' court distributing the estate of Wells Tomlinson, deceased. Pencil-marks were drawn through all bequests made by the testator in his will, except one made to John Keller. The auditor reported a distribution, from which the bequests canceled in the will were excluded. This report the orphans' court refused to confirm, holding that such cancellation was only a deliberative act, and not final.

Neville D. Tyson, for the appellants.

B. E. Chain and William F. Solly, for the appellees.

GREEN, J. The reasoning and the authorities cited in the opinion of this court in the case of *Myers v. Vanderbilt*, 84 Pa. St. 510, 24 Am. Rep. 227, make it very clear that we intended to decide, and did decide, that the writing of a will in pencil is the full equivalent for a writing in ink. Mr. Justice Mercur, in the course of the opinion, said: "So we think the authorities establish that a valid will may be drawn with the same materials that will suffice for the drawing of any written contract. As was well said by Mr. Justice Coulter in *Hill v. Scott*, 12 Pa. St. 169, they abundantly prove that a writing in pencil is equivalent and tantamount to a writing in ink." We there held that a will, the whole of which was written in lead pencil, was in compliance with the requirement of the wills act of April 8, 1833, that "every will shall be in writing." We are entirely satisfied with that decision, and have no disposition to change or modify it. The learned court

below thought that because the cancellation was in pencil, while the will itself was in ink, the cancellation was deliberative only, and not final, and he therefore overruled the auditor, who held it to be final. In doing this the court followed a few English decisions, which, while agreeing that wills written in pencil are valid, yet hold that where alterations were made in pencil they would be regarded, if the will was in ink, as deliberative only. It would not be difficult, upon a review of those cases, to show that in most, if not all, of them the decision was based as well upon other facts and circumstances as upon the fact of the alterations being in pencil; but we do not think it necessary to engage in such a review. We regard our ruling in *Myers v. Vanderbilt*, 84 Pa. St. 510, 24 Am. Rep. 227, as obliterating the distinction between writings in ink and pencil, and assigning precisely the same legal effect to the instrument in either case. If there be no distinction between these methods of writing, so far as their legal effect is concerned, we can see no reason for assigning an effect to a pencil alteration different from that which we would assign to an alteration in ink. If we do that, we say they are not the same, whereas we have deliberately decided they are the same, not only in relation to wills, but to other solemn instruments, as was shown in the opinion in *Myers v. Vanderbilt*, 84 Pa. St. 510; 24 Am. Rep. 227. We do not care to repeat the reasoning and authorities of that opinion, because we deem it entirely unnecessary. It would certainly be inconsistent to hold that in alterations of wills, pencil writing and ink writing have not the same effect, when in all other cases we say they have. As indicative of the testator's intent, the pencil alterations speak quite as certainly as if they were in ink. The will was found after the testator's death, locked up in a drawer in his own room. He chose to leave it in the exact condition in which it was found. As it was found, it clearly canceled certain of the legacies. By what authority can we say that they were not canceled, when in point of fact they were? How can we say it was not the intention of the testator to make these cancellations, when in reality he has made them? Do they not signify the same intent, being in pencil, that they would have signified, being in ink? We have no right to say they do not; and that being so, they prevail alike, whether in ink or pencil.

It is argued that the will was found among papers of no value, and therefore we must infer the alterations were delib-

erative only; but that objection would apply as well to the will itself as to the alterations. If it was found in a place of sufficiently careful custody to sustain it as a will, that custody was equally sufficient to sustain the alterations. Moreover, if sustained at all, it must be only in the condition in which it is found. But the argument upon this ground has no merit. The will was found locked up in a drawer in a bureau standing in the testator's room in which he lay sick and died. The keys, one of which unlocked the drawer, were delivered by the testator, shortly before his death, to Miss Cressman, a relative and his nurse, with direction to hand them to Mr. Dutton, one of the executors, as soon as he was dead. To hold that such a custody was a careless custody, sufficient to raise even a doubt about the intention of the testator in regard to its contents, is simply impossible.

Another circumstance, to which the court attached consequence, was, that a paper was found in the testator's box at bank, which contained a list of the legatees as they were named in the will, and with all of the legacies canceled in pencil that were so canceled in the will, except one, John Keller, whose name was canceled, but not the amount, five hundred dollars. The court thought this was proof that the testator was still vacillating (in 1883 or 1887), because John Keller's name and legacy were not canceled in the will, and therefore that all the cancellations should be regarded as deliberative only. We cannot consider this circumstance as having such a meaning. To us it is indicative rather that the paper found in the bank was probably his first or deliberative memorandum, which he made final when he made the cancellations in the will, and there he concluded to let Keller's legacy remain. We find no other facts in the case indicating that the testator did not intend to do that which in fact he did do, and hence we are of opinion that the view of the whole subject taken by the learned auditor was the correct view, and that it was error to overrule his report.

The decree of the orphans' court is reversed, at the cost of the appellees, and the record is remitted, with instructions to distribute the fund in accordance with the report of the auditor.

WILLS, VALIDITY OF, WHEN WRITTEN WITH LEAD PENCIL. — Where, under the statute, a will is required to be in writing, a will written and signed with a lead pencil is valid: *Myers v. Vanderbilt*, 84 Pa. St. 510; 24 Am. Rep. 227.

ESTATE OF HUNT.

[128 PENNSYLVANIA STATE, 290.]

WILLS. — BEQUEST TO CHILDREN DOES NOT INCLUDE GRANDCHILDREN OF issue generally, except from necessity, which occurs when the will would remain inoperative unless the sense of the word "children" is extended beyond its natural import, or where the testator has clearly shown by other words that he did not intend to use the word "children" in its proper, actual meaning, but in a more extensive sense.

WILLS — CONSTRUCTION. — Where there is a conflict between the literal meaning of a clause in a will or a codicil thereto as fully written out, and the language of a marginal note at its side, the language of the will must prevail. Thus where the word "children" is used in the will or codicil, the meaning of which is free from doubt, while the word "heirs" is used in the marginal note, the words of the will prevail, and grandchildren are excluded.

WILLS — CONSTRUCTION. — When, under a will, bequests are given to a certain class, but under a codicil thereto the bequests to that class are taken away, and another class substituted, the provisions of the codicil must prevail. The class named in the will take nothing, and the class named in the codicil take everything.

APPEAL from a decree of the orphans' court making distribution of the estate of Joshua Hunt. The auditor found that plaintiff, a grandchild of the testator, was not entitled to take under the will. His decision was reversed by the court.

A. T. Freedley and R. E. Wright, for the appellants.

William S. Kirkpatrick and R. I. Jones, for the appellee.

GREEN, J. One of our earliest cases in which the rule that a bequest to children does not include grandchildren was declared was *Hallowell v. Phipps*, 2 Whart. 376. It was thus stated by Mr. Justice Rogers, in delivering the opinion of this court: "Under a bequest to children, grandchildren and other remote issue are excluded, unless it be the apparent intention of the testator, disclosed by his will, to provide for the children of a deceased child. But such construction can only arise from a clear intention or necessary implication; as where there are not other children than grandchildren, or when the term 'children' is further explained by a limitation over in default of issue. The word 'children' does not ordinarily, and properly speaking, comprehend grandchildren or issue generally. Their being included in that term is only permitted in two cases, viz., from necessity, which occurs when the will would remain inoperative unless the sense of the word 'children' were extended beyond its natural import, and where the testator has clearly shown by other words that he did not intend

to use the term 'children' in the proper, actual meaning, but in a more extensive sense." The above statement of the rule was supported by a citation of numerous decisions which fully sustain it in all its parts. With us it has never been departed from, but has been enforced in many instances, and never with any abatement of any of its terms. Examples of this are *Dickinson v. Lee*, 4 Watts, 82; 28 Am. Dec. 684; *Barnitz's Appeal*, 5 Pa. St. 264; *Horwitz v. Norris*, 49 Pa. St. 213; *Castner's Appeal*, 88 Pa. St. 478.

It is very clear that one of the two exceptions to the operation of the rule does not exist in the present case. There are other actual children of the testator, to whom the words of the codicil do apply, and hence there is no reason of necessity for departing from the ordinary meaning of the word "children" as designating the legatees mentioned in the codicil. The other exception is, "where the testator has clearly shown by other words that he did not intend to use the term 'children' in the proper, actual meaning, but in a more extensive sense." All the authorities agree that such intention must clearly appear, and if it does not, the word "children" must be confined to its ordinary meaning.

In support of the contention for the grandchild, much stress was laid upon the marginal notes to the will and codicil, and it was chiefly upon a consideration of the words found in the margin of the codicil that the learned court below held, reversing the auditor, that the grandchild was included in the codicil. The codicil was in these words: "I desire that all my personal estate or property of every kind shall be divided equally between my wife, Hannah L. R. Hunt, and all my children, share and share alike, and that my said wife shall have the same right as my children to take any part thereof that she may want at the appraisement." It cannot for a moment be questioned that these words, by themselves, under all the authorities, clearly exclude the grandchild. Unless the reasoning from other sources plainly shows that she should be included as a legatee, because such was the manifest intent of the testator, she must remain excluded by force of the proper and usual meaning of the word "children," in the codicil. The marginal note by the side of the codicil is in these words: "Personal estate to be divided equally among all the heirs." It is claimed that as the grandchild would be an "heir" in case of intestacy, she comes within the description of those entitled to the estate, and that the testator must be held

to have meant "heirs," in the codicil, instead of "children"; in other words, that he used the two terms, "heirs" and "children," in the same sense. The first reply to this is, that the codicil is the actual, affirmative, testamentary expression, and the marginal note does not even purport to be a part of it. It is a mere memorandum, a curt note or reference to the substance of the codicil. Every section of the will has a similar marginal note by its side, and they were all evidently written, not with a view to make them the substantive testamentary act, but as a short, briefly expressed memorandum of the contents of the will and codicil, to enable the testator to see the whole will at a glance. Of course, if there were a conflict between the literal meaning of a clause of the will as fully written out, and the language of the marginal note by its side, the language of the will must prevail. The marginal note could not be more than a mere aid in the ascertainment of the meaning of the testator, where the fully written out clause of the will makes that meaning doubtful. It certainly would not be legitimate to raise the doubt by means of the note, if the intent is clearly expressed in the body of the will, and then reject the plain, clear meaning of the will and substitute in its place the very questionable meaning of the note, which was neither written nor intended as a part of the testamentary act. The word "children," in the codicil, is absolutely free of doubt as to its meaning. A grandchild is not a child, where there are children to answer the description of the legatees. Certainly, it will not do to strike down the plain meaning of that word, which is in the testament, in order to attribute an entirely different meaning to it, because a word which is very commonly used in a doubtful sense is found here, not in the testament, but in a mere curt, untechnical, inartificial marginal reference.

But in the next place it is perfectly manifest that the word "heirs," in the marginal note, was not used in its technical sense, and therefore does not necessarily embrace the grandchild. That word includes the whole body of those who would or might take a decedent's estate under the intestate law, and is of far broader significance than the word "children" or "grandchildren," or even lineal descendants. Nothing is clearer than that the testator did not use the word in its technical sense. It occurs several times in the notes to the different clauses of the will, and never in its technical meaning. Thus in the seventh section, he uses it as synonymous with

"children" only. He there directs that all his children shall be allowed to select such articles as they may desire from his furniture, silver, and books, "as souvenirs of their home." He then directs that each child shall be charged with the article selected, at the appraisement price, and any portion remaining after "all my children" shall have selected such articles as they may desire shall be sold for the benefit of his estate. This is a privilege which, of course, is limited to his children only; and yet in the note on the margin of the seventh clause are the words: "Heirs may select what they may desire, and take at the appraisement." His grandchild never had her home with him, and nothing of the articles enumerated could be a souvenir of her home to her. In the latter part of the tenth clause of the will, he makes the same use of the two words, "children" in the will, and "heirs" in the margin. In the will he gives to his children a right to take any part of his real or personal estate at the price at which the same may be appraised; and in the note he says: "Property to be appraised; heirs to have refusal." The privilege of selection is limited to the children, and in the margin he refers to them as heirs.

But again, the grandchild is nowhere named in the will. She is not a legatee by name, nor is she even spoken of or referred to as his grandchild, or specifically as a legatee of anything. Under the ninth and tenth clauses of the will, which give the residue to the persons who would be entitled under the intestate law, she would be entitled to take her father's share by representation, and that is the only way in which she could claim a single penny of the estate. But that method of distribution is entirely destroyed by the codicil, which substitutes a totally different method. There he directs that the estate shall be divided equally between "my wife" and "all my children." Now, under the will, the grandchild could come in, not because she was named as a legatee, but because she was one of a class to the whole of whom the residue was given. But under the codicil the gift to that class is taken away, and another class is substituted in its place; the class named in the will take nothing, and the class named in the codicil take everything. The grandchild was a member of the class named in the will, but she is not a member of the class named in the codicil; and to let her in under the codicil would be to destroy the whole scheme of distribution as established by the codicil, and to restore the method estab-

lished by the will. We have no right to do this, and certainly ought not to do it for so very questionable a reason as to admit one who was never named personally or by description in the will, who never could take anything under the will except as a member of a class which can take nothing under the codicil. The scheme of the codicil, of course, must prevail. We cannot possibly let the grandchild into that scheme, unless we force her there in violation of the plainest and clearest words which exclude her absolutely. The only reason for doing this which has any force at all is, that she comes within the technical meaning of a word appearing on the margin of the codicil, which it is conclusively certain the testator did not use in its technical sense in any part of the will or codicil, and which could not be enforced in that sense by any possibility. There is, therefore, no clear intent of the testator, manifest upon the face of the will or codicil, to use the word "children," in the codicil, in any other than its ordinary and proper meaning, and therefore that meaning must prevail.

As to the facts outside the will, they are of but little significance, but such as they are, they lead to the conviction that he intended to exclude the grandchild; but it is not necessary to discuss them. The will and codicil have a plain, clear meaning, in our judgment; and it is our duty to enforce it. The decree of the orphans' court must be reversed.

The decree of the court below is reversed, at the cost of the appellee, and the record is remitted, with instructions to distribute the estate of the decedent in accordance with the report of the auditor, which is hereby confirmed.

WILLS — "CHILDREN," CONSTRUCTION OF. — The word "children" will not be interpreted so as to include "grandchildren": Note to *Elliott v. Elliott*, 10 Am. St. Rep. 60; unless there are no others who can take, except grandchildren, under the provisions of the rule: *Bowker v. Bowker*, 148 Mass. 198.

WILLS — REPUGNANT CLAUSES. — The intention of the testator, as gathered from every part of the will, should be given effect: *Chew v. Keller*, 100 Mo. 362; and every portion of the will should be given its proper effect, unless there arises an irreconcilable repugnance: *Taubenhan v. Dunz*, 125 Ill. 524; *Giles v. Anslow*, 128 Ill. 188. The general rule is, that where an irreconcilable repugnance between two clauses of a will arises, the latter, being the latest wish of the testator, must prevail: *Heidlebaugh v. Wagner*, 72 Iowa, 601; *Ball v. Ball*, 40 La. Ann. 284; *Armstrong v. Crapo*, 72 Iowa, 604. But in *Killmer v. Wuchner*, 74 Iowa, 359, the testator having given an absolute estate to his widow, a subsequent clause attempting to direct the descent of such estate after her death was held void, because repugnant to the absolute bequest already made to her. Provisions of a codicil take precedence over

those of the will: *Sturgis v. Work*, 122 Ind. 134; 17 Am. St. Rep. 349; *Warner v. Morse*, 149 Mass. 400; *Fleming v. Kelly*, 83 Va. 10. But while provisions in a will are revoked by provisions made in a codicil, inconsistent therewith, a codicil is never a revocation of a will further than it is so expressed: *Newcomb v. Webster*, 113 N. Y. 191; *Pate v. French*, 122 Ind. 10. A codicil lacking in the statutory requirements cannot operate to revoke any part of a will, or to take effect as a part thereof: *Magoonan's Appeal*, 117 Pa. St. 238.

COMMONWEALTH v. GARDNER.

[183 PENNSYLVANIA STATE, 281.]

PEDDLER, WHAT CONSTITUTES. — A person who carries about from house to house, small packages of goods manufactured by a foreign corporation, and offers them for sale as the agent of the manufacturers, and who works on a salary, with no personal interest in the goods or their proceeds, is a peddler within the meaning of a statute forbidding the sale of foreign or domestic goods, wares, and merchandise by any person as a hawker or peddler.

CONSTITUTIONAL LAW. — A statute forbidding the sale of foreign or domestic goods, wares, and merchandise by any person as a hawker or peddler relates to the manner of sale, and not the right to sell, is a valid exercise of police power, and is not a violation of the right secured by the constitution of acquiring, possessing, and protecting property.

STATUTE — CONSTRUCTION. — A statute forbidding the sale by any person of goods, wares, and merchandise as a hawker or peddler does not include nor affect the farmer or gardener who raises the natural products of the soil and sells them from house to house. It is only meant to include traders and travelers who, without any fixed place of business, carry their goods on their back, or in a cart or wagon, in search of customers.

CONSTITUTIONAL LAW — INTERSTATE COMMERCE. — A statute forbidding the sale of goods, wares, and merchandise by any person as a hawker or peddler, within a certain territory within a state, is a valid exercise of the police power, and not unconstitutional as a regulation of interstate commerce.

INDICTMENT for peddling. Defendants were convicted, and judgment of fine rendered against them. They appeal.

Cyrus G. Deer and John B. Hinkson, for the appellants.

John W. Ryon, George J. Wadlinger, and R. H. Koch, district attorney, for the appellee.

WILLIAMS, J. The defendants were employed at a salary, by a manufacturing company in Rhode Island, to sell an article of merchandise called "soapine." They came into the county of Schuylkill in the regular course of their employment, and, as they say in the history of the case, in their paper-book, "were in the county temporarily, for the purpose

of selling this article, as the agents of the manufacturers." When they had completed their canvass of the county of Schuylkill, they would, if continuing in the employment of the manufacturers, move on to another county, and subject its citizens to the same system of house-to-house visitation and personal solicitation.

By section 1, act of April 17, 1846, P. L. 364, the sale of foreign or domestic goods, wares, and merchandise in the county of Schuylkill by any person or persons as a hawker or peddler is forbidden. The defendants were arrested under this act while engaged in selling "soapine" from house to house in Mahanoy City, and indicted. On the trial, the jury rendered a special verdict, finding the defendants guilty of selling soapine from door to door, as the agents of the manufacturers, at a salary, with no personal interest in the goods or their proceeds, and submitted these facts to the judgment of the court. The theory of the defendants appears to have been that the manner in which their sales were made was of no consequence, if they did not own the articles sold, but acted as the agents of the owners. But it is the manner of sale that makes a peddler. Webster defines a peddler as "one that carries about small commodities on his back, or in a cart or wagon, and sells them." In the law dictionary of Rapalje and Lawrence, the word is defined thus: "Peddler: A person who carries goods from place to place for sale." Whether the goods are the property of him by whom they are carried and offered for sale, or of another, who employs the seller, is of no possible consequence. The business of the itinerant vender is the same in either case, and so is the inconvenience and annoyance he inflicts on others. The merchant or store-keeper is a resident, has a fixed place of business, where his goods are shown to those who come in search of what they need, where he can be reached by process, and compelled to make good his guaranty of the quality of his wares. The peddler is a transient, with no fixed place of business, who seeks customers by invading their homes, and makes sales by persuading people to buy what they do not need, and who, by the time he is wanted to answer for his representations and engagements, is out of sight and out of reach of process. It is this matter of tracking a laboring man or woman into the home, and laying siege to him or her by an unscrupulous and self-possessed stranger, who is after money, and has no delicate scruples about the manner in which he gets it, that has

made the peddler a dread in the country and in the villages, and has led the law-makers in this and other states to put the business under strict regulations when it is not wholly forbidden. In this case, the jury found that the defendants were doing that which exactly fills the definition of peddling; that is, carrying about from house to house small packages of goods, and offering them for sale. It only remained for the court to pronounce upon the legal effect of the facts found, and enter the appropriate judgment against the defendants as peddlers.

The next point taken by the defendants is, that, under the constitution of the state, an owner of goods has an indefeasible right to carry them when and where he pleases in search of buyers. This conclusion seems to be drawn from a paragraph in the declaration of rights which asserts that all men have certain inherent and indefeasible rights, among which is that of "acquiring, possessing, and protecting property." But a distinction must be taken between the right and the manner of acquisition. The highwayman engages in his business with a view to acquire property, but the trouble is, that his methods of acquisition are open to objection. The same is true of the gambler and the lottery dealer. Some business men have been known, in their zeal to acquire property, to use false weights and measures, but the law lays its hand on the methods they employ. It does not agree that the end justifies the means, and for that reason it punishes the highwayman, the gambler, the lottery dealer, and the cheat, while it recognizes their constitutional right to "acquire, possess, and protect property." Our laws relating to peddling are directed, not against the right of acquisition, but the manner in which some people exercise that right; not to the right of an owner to sell his goods, but to the manner in which he may sell them. Our peddling laws are therefore not in violation of the constitutional rights of the owners of goods, but are a wise exercise of the police power over the manner in which goods, wares, and merchandise shall be sold.

I do not regard the sale of the natural products of the soil by the farmer or gardner by whom they are raised as affected by the laws relating to peddlers. Farmers are not within the mischief which these laws were intended to remedy, except as they are the victims of that mischief. They are not traders or travelers, in any legal sense. The carriage of the surplus products of the farm or garden to a market town, or from house

to house, is not peddling, but is incidental to their business as farmers. Peddlers are forbidden to sell "goods, wares, and merchandise." These words were never intended to include farm products in the hands of the farmer; nor is the transportation of such products to a market for sale, or to regular customers who are supplied by the grower, the sort of business at which the laws relating to peddling are directed. The business they were intended to reach is very plainly indicated in section 1, act of March 30, 1784, 2 Sm. L. 99, which declares: "Whereas, many idle and vagrant persons may come into this state, and under pretense of being hawkers and peddlers may greatly impose upon many persons," etc. The act then provides for protecting the public from such fraudulent practices upon them, by forbidding any person to engage in the business of peddling without a license. It is very clear that this prohibition was not directed against the farmer and his truck-wagon, but against the itinerating vender who carries his goods on his back, or in a cart or wagon, in search of customers. It was directed against him for the protection of the public against the impositions practiced by the class of dealers to which he belongs, in regard both to "the quality and price of goods" carried by them, and against the commission "of felonies and misdemeanors" by the vagrant persons who traveled the country "under pretense of being hawkers and peddlers." But while we are of opinion that farmers and gardeners are not within the letter or the spirit of our laws relating to peddling, this can in no way serve the defendants, for they are not farmers, and "soapine" is not a natural product of the soil. The special verdict assures us that it is a manufactured article produced by the Kendall Manufacturing Company, all of whose stockholders are non-residents of Pennsylvania, and whose factory is located in the state of Rhode Island.

On these facts, so found, the third and last question presented in this case is raised, viz., Is not the sale of "soapine" from door to door in Mahanoy City interstate commerce? This is broadly asserted, and the position is taken that our laws on the subject of peddling are an invasion of the exclusive right of Congress, under the federal constitution, to regulate interstate commerce, and therefore void. We have understood interstate commerce to refer to the free interchange of commodities between citizens of the different states, without regard to state lines. If we are right about this, then the laws relating to peddling do not interfere with

such interchange, and cannot be an invasion of the authority of the United States. They erect no barrier at the state line, provide for no inspection or stoppage, and levy no tax on the introduction into or transportation through the state of any sort of property whatever. The citizen of another state may come into Pennsylvania when he will and where he will, stay as long as he chooses, open as many places for the sale of his goods as he may see fit, and enjoy the same measure of freedom in regard to the conduct of his business as a native citizen. But when he comes within the state, permanently or temporarily, he is under the protection of its laws, and the correlative duty of obedience rests on him. His rights are equal to, but not above, those of the citizen. He has no more right to sell intoxicating drinks without a license, than a citizen; no better right to sell cigarettes to children, or oleomargarine to customers, in violation of law, than a citizen. He has no better right to take a pack on his back, or a horse and cart, and engage in the business of peddling, than a citizen. To hold the contrary would be subversive of law and order, and would render the possession of the police power useless to the state. If it is true, as is now asserted, that the itinerant stranger who threads the country roads and haunts the mining towns, carrying a pack or box filled with sham jewelry and worthless watches, to sell to those who are credulous enough to believe his representations, for many times their real value, and who, as soon as he has "gone through" a neighborhood, moves quickly out of reach,—if it is true that such a person is the ward of the federal constitution, engaged in interstate commerce, with the power of the government of the United States interposed between him and the police power of the state, it must be admitted that we have stumbled on a startling and unlooked-for result of the investment of the general government with the power to regulate commerce. Fortunately, the federal courts do not so hold. They distinctly recognize the police power of the states, and their right to forbid altogether the sale of such articles as are injurious: *Powell v. Pennsylvania*, 127 U. S. 678. The same doctrine was held in the Kansas cases arising under the prohibitory feature of the constitution of that state. We think the questions in this case were rightly decided in the court below, and the judgment is affirmed. —

PEDDLERS, WHO ARE. — Persons who go about from house to house soliciting orders for the purchase of goods to be delivered in the future are ped-

dlers: *Grafty v. Rushville*, 107 Ind. 502; 57 Am. Rep. 128, and note 136, 137. A commercial traveler, or "drummer," is a peddler: *Ex parte Taylor*, 58 Miss. 478; 38 Am. Rep. 336. Farmers raising agricultural products do not become peddlers, within the meaning of a law imposing a tax upon peddlers, by bringing such products to the city and selling them: *Davis v. Macon*, 64 Ga. 128; 37 Am. Rep. 60; and to the same effect, substantially, is *St. Paul v. Traeger*, 25 Minn. 248; 33 Am. Rep. 462. Compare *Davenport v. Rice*, 75 Iowa, 74, 9 Am. St. Rep. 454, which decides that a person is not a peddler, within the meaning of a city ordinance imposing a fine for peddling goods without a license, who, being in the service of a resident merchant, calls upon citizens and solicits orders for goods kept by such merchant.

HENDERSON v. HENDERSON.

[123 PENNSYLVANIA STATE, 369.]

JUDGMENT LIENS, EQUITABLE TITLE NOT SUBJECT TO. — When land is devised to an executor, with absolute power to sell and divide the proceeds among the heirs, the latter may elect, by some decisive act to that effect, to take the land in lieu of the money, and such election will vest an equitable title in them, which cannot be subjected to judgment or mortgage liens, or taken in execution.

FRAUDULENT CONVEYANCE BY HEIR. — When land is devised to an executor, with absolute power to sell and divide the proceeds among the heirs, and they have elected to take the land instead of the money, and have agreed upon a partition among themselves, and one of them, to put his share beyond the reach of creditors, has had it conveyed to his wife instead of to himself, the conveyance is fraudulent and void as to his creditors.

SHERIFF'S RETURN MAY BE IMPEACHED, and shown to be without validity as to a judgment creditor, by proof that the date of levy under another judgment was no part of the sheriff's return thereon, that the return as in fact made was without date, and that the date appearing therein was afterwards inserted by the sheriff; and this although specific instructions to the sheriff accompanied the writ to levy upon certain property specifically described.

FRAUDULENT CONVEYANCE — JUDGMENT LIEN. — A judgment recovered subsequently to a fraudulent conveyance, and based upon indebtedness contracted partly prior and partly subsequent thereto, is a lien upon the property of the judgment debtor only to the extent of the indebtedness contracted prior to the fraudulent conveyance.

FRAUDULENT CONVEYANCE — JUDGMENT LIEN. — Where an heir elects to take land instead of money, under a power contained in the testator's will, and has the land conveyed to his wife in fraud of his creditors, a defrauded judgment creditor who sells the land as the property of the husband does not thereby acquire a preference over prior liens on the ground that his judgment was used as the instrument of sale; nor will the fact that, prior to such election and conveyance, the heir assigned to him, as security for his debt, his interest in the fund to arise from the sale directed by the will give him such preference. It is the debtor's estate which is sold; and the liens upon it which attached subsequently to the fraudulent conveyance must be paid in their order as to priority.

APPEAL by M. Henderson from a decree of distribution of the proceeds of a sheriff's sale of the property of Alvin P. Henderson on an execution issued on a judgment obtained by the former against the latter. Prior to the rendition of such judgment and the settlement of the estate of the deceased father of Alvin P. Henderson, the latter had assigned to M. Henderson all his interest in the estate, to secure the debt on which the judgment was rendered.

W. I. Schaffer and W. B. Broomall, for the appellant.

Isaac Johnson, for the appellees.

CLARK, J. By the last will and testament of Robert D. Henderson, deceased, dated November 3, 1880, his real estate was devised to William B. Broomall, the executor, to be by him sold, and the proceeds thereof, together with the rest and remainder of the testator's estate, divided among his children in equal shares. The power to sell is not contingent or discretionary; it is absolute and imperative. The provision for his children is a bequest of the proceeds, not a devise of the land, the title to which was in his executor. The devise to his executor, with this power and direction, was therefore an equitable conversion of the realty into personalty.

It was competent, however, for the heirs, formally, or by some decisive act to that effect, to take the land in lieu of the money. Not that the heirs "had any equitable interest in the land," as we said in *Mellon v. Reed*, 123 Pa. St. 17, "but being the only parties beneficially interested, they had the power to control the event. In such a case, the heirs take title, not by the will, but by their own act. Their election to take the land is an appropriation of their interests, under the will, to the acquisition of the land, as upon a purchase, and an equitable estate or title is thereby created in them, which chancery will execute by compelling a conveyance. But until the act of election the heirs have no estate or title which would be the proper subject of a lien either by judgment or by mortgage, or which could be taken in execution." See also *Roland v. Miller*, 100 Pa. St. 50, and cases there cited.

On April 24, 1885, when Matthew Henderson entered his judgment, the heirs had not yet made any formal election, nor had they done any decisive act equivalent thereto; his judgment, therefore, was not a lien upon the land at the time of its entry. It was not until some time about December 2, 1887, that any steps were taken to this end. On that day the execu-

tor sold the entire real estate at a public sale, to Hugh Hazlett and Mary M. Henderson, for twenty-five thousand dollars, they being the highest and best bidders, and on December 5th following made, executed, and delivered a conveyance to the purchasers thereof in due form. The property prior to this had been laid out in building-lots, and the sale would appear to have been made with a view to a partition or division of these lots among the heirs. Some of the heirs, it seems, were minors, and some had assigned for creditors, and were therefore disqualified from exercising the right of election, and the sale was resorted to in order to put the title in such shape that partition could be made. There is no allegation that the sale was not in due form or in good faith, or that the price was inadequate; it was a public sale, made upon due notice, and was open to all bidders. Matthew Henderson was not present. He knew Broomall had the power to sell and that he actually did sell the land, and has made no objection. It is true it was made with a view to partition, and that the purchase-money was paid to the executor by the releases of the several heirs, who accepted portions of the land in lieu of their shares of the money; but it seems to be conceded that the trustee acted in good faith, and we cannot see upon what ground the validity of the sale can be impeached; indeed, the present proceeding is in affirmance of the sale, and we do not know that its validity is in any way called in question.

It appears, however, that Alvin P. Henderson's share of the lots was, on December 5, 1887, conveyed by the purchasers at the executor's sale, not to him, but to his wife, Lizzie C. Henderson, who says that she was informed by her husband he would have the lots conveyed to her; but she freely admits that she paid no money and gave no consideration therefor, that she was not present when the deed was made, nor had she any one to represent her. She says she understood from her husband that this would make them safe, and that no one could take the lots for his debts.

On August 6, 1888, a *fiery facias* was issued on the Matthew Henderson judgment, and the sheriff was directed to levy upon the right, title, interest, and claim of Alvin P. Henderson in the lots conveyed to his wife; on the same day, the judgment of James M. Henderson for two thousand dollars was entered. This judgment, given in trust for certain of the defendant's creditors, was subsequently marked to the use of George K. Cross, and for convenience we will refer to it as the "Cross

judgment." It was entered after the conveyance to Lizzie C. Henderson; and the lien thereof, therefore, attached to whatever interest Alvin P. Henderson may have had therein, if he had any, at the date of its entry. The Matthew Henderson judgment, on the other hand, having been entered long before the reconversion of the legacies into land, was not a lien against these lots, except by virtue of the levy.

The sheriff's return as it now appears upon the writ is, that the levy was made on the same day the writ came into his hands, August 6, 1888, which is the date of the entry of the Cross judgment; but it is shown in the most satisfactory manner, not only by the sheriff himself, but by other witnesses, that the return as it was in fact made was without date, and that the date, "August 6, 1888," was afterwards inserted by him, at the instance of the attorney for the writ. That the testimony of the sheriff and of the other witnesses was admissible, in a contested distribution, for this purpose, cannot be doubted; for the purpose was, not to contradict the return, but to show what the sheriff's return in fact was; it was not to contradict the record, but to establish it. It must be conceded that after the writ was returned it had passed out of the sheriff's power; his return was then part of the record, and he could neither add to nor subtract from it without leave of the court. This act of the sheriff was wholly without authority, and it was competent for those claiming in this distribution under the Cross judgment to show that the date of the levy was no part of the sheriff's return, but was an unauthorized interference with and alteration of the record, which could have no force or validity whatever against them. There is a rule of law that the sheriff's return is conclusive in the case in which it is made, and upon privies: *Paxson's Appeal*, 49 Pa. St. 195; and that the record of a court of record imports verity, and cannot be contradicted; there is a rule, equally well established, that an instrument under seal cannot be contradicted by the parties, or altered or amended by parol; yet no one has ever doubted that a return or a record or any instrument under seal may be impeached for fraud or forgery; for the fraudulent alteration is no part of the instrument or of the record, and upon this principle the words added to this return are no part of it, and may be excluded.

The testimony shows that this levy was not made upon August 6, 1888. It is true, specific instructions to the sheriff accompanied the writ, to levy upon certain property particu-

larly described, and it may have been supposed that this was equivalent to a levy, and justified the insertion of that date; but this was not a levy; it was a mere direction to levy, and no levy was in fact made until August 10, 1888. As the Cross judgment was entered on August 6, 1888, and the levy on the Matthew Henderson judgment was not made for four days later, it follows that, unless some other rule of law or of equity intervenes, the Cross judgment must be taken to have precedence in the distribution.

But it is said that the conveyance to Lizzie C. Henderson was in fraud of the creditors of her husband, and that Matthew Henderson was the particular creditor intended to be defrauded; that the interest or title of Alvin P. Henderson, taken on execution on the Henderson writ, was such interest only as remained in him after the fraudulent conveyance to his wife, and that the sheriff's sale conveyed to the purchaser merely the right to contest her title, as distinguished from the right which would have accrued to a purchaser upon a sale of the absolute estate on a judgment entered before the conveyance; and to sustain this view, *Byrod's Appeal*, 31 Pa. St. 241, *Hoffman's Appeal*, 44 Pa. St. 95, *Beekman's Appeal*, 38 Pa. St. 385, and that line of cases, are cited. It is contended further that the conveyance to Mrs. Henderson was not made in fraud of the Cross judgment; that that judgment was substantially for a debt contracted after the fraud was complete, and that James M. Henderson was, from the date of the conveyance, fully cognizant of the fraud; that in consequence of this, a sale, if it had been made on that judgment, would not have put the purchaser in a position to contest the fraud, or to raise the fund now for distribution, and that therefore the Cross judgment cannot participate in this fund; in other words, that this fund is distributable only to such judgment creditors as the fraudulent conveyance tended to defraud, and the Cross judgment is not one of these.

But the facts assumed by the appellant are not wholly justified by the proofs. A considerable portion of the Cross judgment, it is shown, is for debt contracted before the deed to Lizzie C. Henderson, and the conveyance certainly tended to defraud him to this extent. Nor does it appear that James M. Henderson, or any of the creditors for whose benefit the judgment was taken, had any participation in the fraud, or in any way gave it their approval. Both of these contesting judgments, one in part at least, by virtue of the entry as a

lien, and the other in consequence of the levy, are liens upon the same interest or estate, and a sale upon either would pass to the purchaser whatever title the defendant had for his creditors under the conveyance to his wife. If in this distribution it had been shown that the plaintiff in the Cross judgment had been a participant in the fraud, he would have been postponed; but the mere fact that the appellant's judgment was used as the instrument of sale will not give him a preference over prior liens. The case upon this branch is ruled by *Hoffman's Appeal*, 44 Pa. St. 95, *Jacoby's Appeal*, 67 Pa. St. 434, and *Dungan's Appeal*, 88 Pa. St. 414. In *Hoffman's Appeal*, 44 Pa. St. 95, it is said that a junior judgment creditor cannot appropriate the whole price to the payment of his judgment, on the ground that he was the instrument to effect the sale; "it is the estate of the debtor," as the court said in that case, "whatever that may be, which is sold at the sheriff's sale, and therefore the liens upon it which attached after the fraudulent grant must be paid in their order."

But the rule thus generally expressed has a more restricted operation in cases where the facts are different. In *Hoffman's Appeal*, 44 Pa. St. 95, all of the judgments claiming to participate in the fund for distribution were for debts contracted before the date of the fraudulent conveyance, and were such as the conveyance tended to defraud. It is well settled that a fraudulent conveyance is good between the parties; only persons whom the transaction tended to defraud have standing in court to avoid it; as against all other persons, the deed vests a good title in the grantee. Prior lien creditors, or prior creditors assenting thereto, and subsequent creditors whom the debtor did not intend to defraud, are not defrauded by such a deed, and have no standing to impeach it: *Zuver v. Clark*, 104 Pa. St. 222. It follows that the Cross judgment is only entitled to participate in this distribution to the extent to which the transaction tended to defraud the holder of that judgment. To this extent the judgment was a lien upon the fraudulent title of the husband, standing in the name of his wife; the residue of the judgment was a lien upon nothing, and is entitled to nothing in this distribution.

As against this partial allowance of the Cross judgment, the argument of the appellee is, that this deed is not to be regarded as a fraudulent conveyance; that there was no fraud, and the auditor so found; that the conveyance to Lizzie C. Henderson was in good faith, and the distribution is to be

made upon the footing of a trust in her for her husband's pre-existing creditors, no part of the consideration having been paid by her. But this finding of the auditor is clearly erroneous; the avowed and confessed purpose of Alvin P. Henderson and of his wife was to make themselves safe, so that no one could take the lots from them for his indebtedness. The fraud is so palpable and plain that a further reference to and discussion of the facts is unnecessary.

Nor can the assignment of April 23, 1885, which was given to Matthew Henderson as collateral security for the judgment note, affect this distribution. The fund in court is the proceeds of the sale of the interest or title of Alvin P. Henderson in the real estate in the name of his wife, and it must, of course, be distributed to his lien creditors in the order of their priority. The assignment is good only against the fund in the hands of the executor; it can have no force or effect here. If it be said that it was Matthew Henderson's money, and not the money of Alvin P. Henderson, that formed the consideration of the conveyance, and that a trust resulted to the former, and not to the latter, the remedy was in a different form. This fund arose from the sale of the title and interest, large or small, of Alvin P. Henderson, and must go to his lien creditors in the order of their liens.

In *Bailey v. Allegheny Nat. Bank*, 104 Pa. St. 425, a mortgage executed by one who was only entitled to a share in the proceeds of the land, and not the land itself, was treated as a provisional election on his part to take the land in lieu of the money, contingent upon the agreement of the other heirs uniting therein, and an equitable assignment, in the mean time, of the interest of the heir as personalty, which after partition attached as a lien to the purpart allotted to the mortgagor in severalty. But that case can have no application here, as neither the assignment nor the judgment could be regarded as a provisional election to take the land; they were both, in terms, to a different effect.

The decree of the common pleas is reversed, and the record is remitted in order that distribution may be made in accordance with this opinion, the appellees to pay the costs of this this appeal.

JUDGMENT LIEN, TO WHAT ATTACHES.—The lien of a judgment does not attach to an equity: *Jackman v. Hallock*, 1 Ohio, 318; 13 Am. Dec. 627; note to *Filley v. Duncan*, 93 Am. Dec. 348-351.

OFFICER'S RETURN, CONCLUSIVENESS OF.—As to persons not parties to the suit, an official return is merely *prima facie* evidence of the facts stated therein: *Phillips v. Ellwell*, 14 Ohio St. 240; 84 Am. Dec. 373; and a plaintiff is not estopped from showing the falsity of a return, in an action against a sheriff, because he offered the return in evidence: *Dunlap v. Fraw*, 10 La. Ann. 83; 63 Am. Dec. 591.

FRAUDULENT CONVEYANCES.—In *Usher v. Huzelline*, 5 Greenl. 471; 17 Am. Dec. 253, it is decided that a creditor who blends in one suit debts accruing before and after a conveyance which is fraudulent, and who recovers a judgment for the whole demand, will be regarded as a subsequent creditor. Existing creditors may avoid a conveyance for fraud at law: *Lowestrot v. Campbell*, 139 Ill. 503; but subsequent creditors can only do so on proof of actual or express fraud against them: *National Bank v. Jaffray*, 41 Kan. 695; *Lewis v. Simon*, 72 Tex. 470.

FRAUDULENT CONVEYANCES—HUSBAND AND WIFE.—A voluntary conveyance from a husband to his wife is considered fraudulent as to existing creditors, no matter how pure the motive which induced it: *Belford v. Crane*, 16 N. J. Eq. 265; 84 Am. Dec. 155, and note. See also note to *Driggs v. Norwood*, 7 Am. St. Rep. 83; *Dixon v. Sunderson*, 72 Tex. 359; 13 Am. St. Rep. 801; *Petters v. Duvernois*, 73 Mich. 481; but the husband's creditors cannot complain of his conveyance to his wife of his homestead: *Belden v. Younger*, 76 Iowa, 567; *Dull v. Merrill*, 69 Mich. 49; unless they prove further that the homestead was for some reason subject to sale for the satisfaction of their claims: *Payne v. Webster*, 76 Iowa, 376. In *Gross v. Eddinger*, 85 Ky. 168, where a husband transferred his business to his wife, who was empowered to trade as a *feme sole*, and thereafter he carried on the business as his wife's agent, the business being subsequently sold, and with the proceeds realty purchased in the wife's name, the court decided that the conveyance to the wife was fraudulent as to the husband's creditors. So in *Grayson v. George*, 85 Va. 908, where a husband sold his wife's personality, it not being her separate estate, and with the proceeds bought realty, which he afterwards conveyed for a good consideration to his son's children, the conveyance was considered voluntary, and fraudulent as to his creditors. In *Holmes v. Hershberger*, 21 W. Va. 517, where a contract of sale was made with an insolvent husband, who afterwards has the deed made to his wife to avoid the payment of his debts, the conveyance was determined to be fraudulent as to the husband's creditors. But a husband handling his wife's property as her agent does not thereby render it liable for his debts: *Buhl v. Peck*, 70 Mich. 644.

A conveyance by a husband to his wife, upon a valuable consideration, such as a debt owing to her by him, is not a voluntary conveyance, nor fraudulent as to his creditors: *Meigs v. Dibble*, 73 Mich. 101; *Jones v. Snyder*, 117 Ind. 229; *Reed v. Abernathy*, 77 Iowa, 438; *Romane v. Maddux*, 77 Iowa, 803.

Voluntary conveyances from a husband to his wife are valid as to everybody except the existing creditors of the husband: *Deering v. Lawrence*, 79 Iowa, 611; *Templeton v. Truitt*, 88 Tenn. 595; and may be valid even as to such creditors, as when the husband is financially solvent at the time of the conveyance: *Morgan v. Hecker*, 74 Orl. 540. A conveyance to the wife, with intent to defraud his creditors, this intent being known to the wife, renders the deed fraudulent as to such creditors: *Watson v. Millsap*, 77 Iowa, 762. A conveyance made directly or indirectly from a husband to his wife, although in consideration of a valid debt due from the husband to the wife, is fraudulent as to existing creditors of the husband, when it is proved that the

consideration was for less than the value of the property, and that they attempted to make out a consideration equal to or in excess of the value of the property by adding to said valid debt other fictitious indebtedness of the husband to the wife: *Webb v. Ingham*, 29 W. Va. 389. Although a deed executed by a husband to a wife, in fraud of his creditors, may be avoided by them, it cannot be avoided by the husband himself: *Knight v. Glascock*, 51 Ark. 390.

EASTON, SOUTH EASTON, AND WEST END PASSENGER RAILWAY COMPANY v. CITY OF EASTON.

[183 PENNSYLVANIA STATE, 505.]

NUISANCE—POWER OF MUNICIPALITY TO DECLARE WHAT IS, AND TO ABATE THE SAME.—Where a railroad company has laid its track upon the streets of a city in good faith, and under authority of chartered rights, the city officers, by themselves, and without legal proceedings, have no right to declare it a public nuisance because the kind of rail used was not for the best interests of the city and was laid in violation of a city ordinance, and then proceed to abate it by force. By so doing they become trespassers and rioters, liable civilly and criminally as such. Where in such a case the company applies for an injunction, and the city does not ask for an adjustment of the differences between itself and the company, the injunction should be granted, without regard to the merits of the controversy.

RAILROADS—RIGHT TO ADOPT IMPROVED RAILS.—A street-railroad company whose charter is silent as to the kind of rail to be used is not confined to the use of the kind of rail generally adopted when the charter was granted, but may adopt another and improved rail when by so doing it does not impose an additional burden upon the street nor upon the city.

Frank Reeder, Henry W. Scott, and F. Green, for the appellant.

H. J. Steele, city solicitor, and O. H. Meyers, for the appellees.

PAXSON, C. J. It is conceded that the appellant company is a corporation chartered by act of assembly in 1866, and that it has the right, under its charter, to occupy any of the streets of Easton and South Easton with its road; that said company has constructed, and has for many years maintained, a railroad upon Third Street, in Easton, for the purpose of carrying passengers over the same; that there is nothing in its charter which prescribes the kind of rail to be used; that when originally constructed, in 1867, the flat rail was laid, and that the same was used continuously until November, 1888, when said company took up its track on Third

Street, and relaid it with T rails, to a point at the southerly terminus of the street, near the entrance to the county bridge across the river Lehigh, and made a similar change in the rails on its road along Fourth Street and Northampton Street; that at the time of this change there was no ordinance of the city prohibiting the use of this kind of rail, and if not conceded, it was certainly proved clearly that the purpose of appellant company to reconstruct its track with T rails was known to the city engineer, the members of the highway department, and the city councils, and formed a subject of discussion at the highway department; that no objection or remonstrance was made thereto by the city, or by any authorized agent thereof; that the city engineer was called upon by the company to furnish it with cross-section grades of the street, in order that its tracks might be built to conform thereto; that he complied with this request, and his action in doing so was formally approved by resolution adopted concurrently in both branches of city councils on November 2, 1888; that on June 17, 1889, the city councils passed an ordinance, the first section of which provided as follows: "That it shall be the duty of all passenger-railway companies to conform to the surveys, regulations, and gradients as they are now or may be hereafter established by law. They shall submit all plans, courses, styles of rails, and the manner of laying the same, either as to repairs, extension, or construction of such railway, to the highway department, for their approval and sanction, which shall be obtained before they proceed to make such repairs, break ground, or occupy any of the streets, avenues, or alleys within the limits of the city." Without going into tedious detail, it is sufficient to state that in June, 1889, upon the rebuilding of the county bridge over the Lehigh River, the street approach was lowered and widened to meet the changes of the bridge; the track of the company from the bridge to the northern side of Washington Street was taken up, without notice to the company, by the contractor in charge of the work; that the city refused to relay the track, and after several days had elapsed, the company, on June 29th, proceeded to relay it; that a few days before the track was so relaid, a notice from the commissioners of highways was served on the company not to relay said track with T rails; that on the morning of Monday, July 1st, the city, through its officers and agents, proceeded to tear up the track which had been thus relaid. The

company then filed this bill against the city, its mayor, officers, and members of its highway department, praying for an injunction to restrain them from any further interference with its road. A temporary injunction was granted, the track was relaid, the case proceeded to final hearing; and it now comes up upon appeal from the final decree of the court below dismissing the plaintiff's bill.

The contention of the city is, that it has the absolute right to control the kind of rail to be used by the company, the manner of laying it, and also the repairs to the track. The company contends, on the other hand, that by its charter it has the right to lay down any rail, in its discretion, suitable for the purposes of its road, which does not interfere seriously with the rights of the citizens to use their streets; that they are not to be held to the rail first adopted because first used, but may take advantage of any improvements in railroad construction; and that the T rail which they have adopted, from its small size, and the manner in which it is laid, interferes with the public use of the streets as little as the flat rail formerly in use, while it is far cheaper and more economical. The master took a vast amount of testimony as to the merits of the respective rails, ninety-nine witnesses having been examined on this point alone, and found as a matter of fact that the T rail used by the company was one suitable for the purposes of a street passenger railway; that the burden imposed on the street by the use of the T rail, both as to the inconvenience of the traveling public and encumbrance to the highway, was no greater than would have been occasioned by the use of a flange or flat rail; and that he cannot find that the use of a T rail imposes upon the municipality a greater burden in keeping the street in repair than does a flat or flange rail. The learned judge below practically reversed the master upon all these findings of fact, and dismissed the bill. While this matter is not of much importance, in our view of the case, it is only fair to the master to say that his findings are fully sustained by the evidence. As now presented, however, it must be disposed of upon other principles.

The bill was filed by the appellant company to restrain the city and its officers from "obstructing, taking up, removing, or otherwise interfering with the plaintiff's railway track on South Third Street, in the city of Easton, or elsewhere, or in any wise obstructing or interfering with plaintiff in the exer-

cise of its franchises." The company has alleged and proved the commission of certain acts which it contends were unlawful, and which resulted in the tearing up of its track and an interference with its franchises, traffic, and business. There is no manner of dispute as to what the city has done, and it remains to determine whether such action was lawful, and performed in a lawful manner. If unlawful, it is very plain that the decree below must be reversed, and the injunction must go.

We have very decided views in regard to the course pursued by the city officials. There was a dispute between them and the appellant company as to the kind of rail to be used. It was a dispute not unlikely to arise under such circumstances. It presented a fair subject for contention, and the law provides adequate and orderly ways of settling such differences. The question here is, not what were the merits of this controversy, — upon that subject we are not now called upon to express an opinion, — but, Were the city officials justified in deciding this question, both as to its law and its facts, and then carrying their decree into effect by an act of brute force? Could the officials of the highway department, after seeing these rails laid down months before, and making no objection thereto, suddenly decide that it was an unlawful structure, and proceed to abate it with a strong hand? Conceding that the city had rights in this matter which the company were bound to respect, it is equally clear that the company had rights which the city officials were bound to respect. It is true a municipality may, with the strong hand, abate a public or common nuisance which endangers either the health or the safety of its citizens. This much was decided in *Klingler v. Bickel*, 117 Pa. St. 326. But no one contends that this road was a nuisance of this character, if a nuisance at all. Nor is there any analogy between this case and that of the obstruction of a public highway by an unauthorized person. It was a track laid down upon the streets, under the authority of chartered rights; and if the kind of rail used was not the best for the interests of the city, yet it was put down in entire good faith, and by authority of law. We cannot assent to the proposition that the company is bound by its charter to the same kind of rail in use when the charter was granted. There is neither reason nor law to sustain it. Such a construction would deprive the company of the benefit of any advance in railroad science, and would prevent the adoption of a better rail, even if the same

were advantageous both to the company and to the city. There was nothing in the case to justify the conclusion that this track as laid with the T rail was a public or common nuisance, which the highway department could forcibly and of its own will abate. The learned judge below appears to have felt the force of this, for, after a discussion of the facts, he makes use of this language: "Under such circumstances, the plaintiff had no right to call upon the master, and has no right to call upon the court, on a motion for an injunction, to decide the question of nuisance or no nuisance"; citing *New Castle v. Ranry*, 130 Pa. St. 546. In this he was entirely right; yet the question naturally suggests itself, If the master and the court below had no right to decide a question of nuisance or no nuisance, upon a motion for a special injunction, what right had the chief commissioner of highways and his assistants, who are not presumed to be learned in the law, to decide for themselves, without any proceeding before them, that this track, as laid, was a common nuisance? If they did not so decide, if in point of fact the track was not a common nuisance, they had no right to tear it up; they were merely trespassers and rioters, and liable civilly and criminally as such. We are emphatic upon this point, because we do not wish to be misunderstood. There is a growing disposition in this commonwealth, especially on the part of corporations, private as well as municipal, to take the law into their own hands, and settle controversies by force, instead of appealing to the courts to redress their wrongs and enforce their rights in an orderly and peaceable manner. Instances are not rare, and are of recent occurrence, where bands of men have stood confronting each other, some of them with arms in their hands, in the assertion of supposed rights. The public peace has been threatened in this manner, sometimes resulting in loss of life. It is well that it should be known that such persons, whether representing individuals, private corporations, or municipalities, are simply rioters, and answerable to the criminal law for their conduct. It is a serious mistake to suppose that municipal officers are above the law, and can enforce civil rights, or perform even police duties, in their own way, in disregard of the forms of law. The officers of a municipality, from the mayor down to a police-officer, are as much bound by the law as a private citizen, and have no license to transgress the law in the enforcement of the law.

The defendants have no right, in this proceeding, to ask this

court to settle any question affecting the rights of the city in the matter in controversy. They have not filed a cross-bill, nor have they applied to this court, or any other court, to adjust the differences between the city and the appellant company. They have no prayer for relief. On the contrary, they have assumed to decide the delicate questions involved for themselves, and to enforce their decision by the strong hand. This cannot be permitted. We are of opinion that their acts were unlawful, and that the plaintiff is entitled to the relief prayed for.

The decree is reversed, and the bill reinstated, and it is ordered that the record be remitted to the court below, with directions to issue an injunction as prayed for, the costs to be paid by the appellees.

NUISANCES — MUNICIPAL CORPORATIONS. — As to the power of a municipal corporation to determine what is a nuisance, see note to *Milne v. Davidson*, 16 Am. Dec. 194-198. An ordinance declaring a particular use of property a nuisance does not make it such, unless it is a nuisance in fact: *Tissot v. Telegraph etc. Co.*, 39 La. Ann. 996; 4 Am. St. Rep. 248; for municipal corporations cannot declare that to be a nuisance which is not: *Village of Des Plaines v. Poyer*, 123 Ill. 348; 5 Am. St. Rep. 524; *Ex parte O'Leary*, 65 Miss. 180; 7 Am. St. Rep. 640.

IN THE CASE OF *Milvale Borough v. Evergreen R'y Co.*, 131 Pa. St. 1, it is decided that a railroad company which is authorized to use steam, and carry freight over its road, may lay upon a street the T rails, even though they are not expressly authorized, and may obstruct travel to a greater degree than other rails.

MONTGOMERY WEB COMPANY v. DIENELT.

[183 PENNSYLVANIA STATE, 585.]

FRAUDULENT CONVEYANCES — INSTRUCTIONS. — Where in an action to set aside a conveyance as fraudulent the fraud cannot be shown by direct proof, and circumstantial evidence is relied upon for that purpose, the attention of the jury must be directed to the effect of the united force of such evidence; and it is error to take it up item by item and dismiss it, with the conclusion that it does not prove the case.

FRAUDULENT CONVEYANCE BY CORPORATION. — Where one corporation sells its property to another, thereby forming a new corporation composed mostly, if not wholly, of the same persons, the transaction is fraudulent and void as to creditors of the old corporation not assenting thereto, and persons who hold stock in the new corporation, solely in consideration of their claims as creditors of the old one, are chargeable with notice of the fraud, and are not innocent purchasers as against execution creditors of the old corporation who did not assent to the change. The latter may follow the specific property of the old corporation, as in other cases of transfers fraudulent as to creditors.

Issue framed to determine the claim of title made by the plaintiff to certain property taken in execution as the property of the Aronia Fabric Company, at the suit of Dienelt and Eisenhardt, a partnership. At the trial, the plaintiff produced as a witness one Hamburger, who testified that the plaintiff purchased by bill of sale the property of the Aronia Fabric Company, including the property in dispute, for a consideration of one dollar and the assumption of certain debts of the latter company; that at the time of this transaction he was president of both the latter company and of the plaintiff company; that a suit was then pending against the Aronia Fabric Company, brought by the defendants, who recovered judgment, to collect which the property in dispute was levied upon; that the bill of sale transferred all the property of the Aronia Fabric Company, except some looms, which were retained to pay rent and other little claims, and that these looms were afterwards sold for less than enough to pay such rent; that the Montgomery Web Company was a corporation formed entirely of old stockholders and creditors of the Aronia Fabric Company, including all unpaid creditors of the latter, except the defendants; that the stockholders in the old corporation paid no value for their stock in the new one,—the property was simply turned over under arrangement by which those stockholders took stock in the new corporation equal in amount to that held in the old; that the plaintiff paid the claims of all creditors, except the defendants, partly in stock and partly in cash; and that no notice of the intention to carry out this arrangement was given to the defendants, on the supposition that a just defense to their claim existed. The jury returned a verdict for plaintiff. Judgment was rendered for it, and the defendants appealed.

Louis M. Childs, James S. Williams, and Montgomery Evans,
for the appellants.

J. P. Hale Jenkins, for the appellee.

MITCHELL, J. Two questions are presented in this case: 1. Whether the transfer from the Aronia company to plaintiff was fraudulent in fact, as against the appellants; and 2. Whether it was fraudulent in law.

On the first question, the verdict of the jury was in favor of the good faith of the transaction; but unfortunately it is without weight, as it was rendered under a charge which scarcely

permitted any other result, and which was justly open to the exceptions taken to it. Fraud, as has so often been said, can rarely be proved by direct and positive testimony, and great liberality is always allowed in the introduction of evidence having a tendency to show it. "When creditors are about to be cheated," says Chief Justice Black in *Kaine v. Weigley*, 22 Pa. St. 183, "it is very uncommon for the perpetrators to proclaim their purpose, and call in witnesses to see it done. A resort to presumptive evidence, therefore, becomes absolutely necessary, to protect the rights of honest men from this as from other invasions." The present case followed the usual course. Defendants had to get their testimony from the other side, and from the circumstances, and were not able to make positive and direct proof of the fraudulent intent, but had to rely upon circumstances pointing thereto. In his charge, the learned judge took these up *seriatim*, and disposed of them summarily in the passages assigned for error, as follows: "What facts are before you to show that there was any fraud in this transaction? The mere fact that they [appellants] were not provided for would not in itself be fraud. Now, it appears that a paper was drawn up and signed by all the creditors except these particular parties. This was a perfectly legal transaction. If this transferring was not done for the purpose of defrauding these particular creditors, it was perfectly proper." And again: "Now, the facts and circumstances related here to show fraud are, first, that they [defendants] were not thus provided for; and in the second place, certain declarations made by the president . . . in an affidavit. . . . [The jury] must determine from the facts before them, and from all the inferences to be drawn from these facts. Because defendants may lose their claim, is not evidence that they were intended to be defrauded." This was not an adequate presentation of the case. It omits all mention of the facts that the failure to provide for defendants, to include them in the paper, or to give them notice of the proceeding was intentional,—always a cardinal point in the proof of fraud; and it makes no reference to the removal of the Aronia company's goods without leaving enough to pay even the rent, to the fact that the transfer was made on the eve of a trial which was sure to result in a judgment in favor of appellants, and perhaps to other circumstances of suspicion. But the substantial defect of the charge is in its treatment of the items of evidence one by one, without at any time directing the view

of the jury to their united force. There probably never was a case of circumstantial evidence that could not be blown to the winds by taking up each item separately, and dismissing it with the conclusion that it does not prove the case. The cumulative force of many separate matters, each perhaps slight, as in the familiar bundle of twigs, constitutes the strength of circumstantial proof. This presentation of the case to the jury we unfortunately do not find anywhere, and for want of it, we are obliged to sustain the third, fourth, and fifth assignments of error.

But secondly, was this transfer fraudulent in law? Here, again, the true point of the case has been unfortunately overlooked. The question is stated in the opinion of the court to be, whether a corporation can lawfully dispose of its assets without the assent of all its creditors, there being no actual fraud intended; and this is the question that has been argued here by appellee. But it is only half the question, and the pinch of the case lies in the omitted portion: Can the stockholders of a corporation make such a transfer to themselves? The Montgomery company is substantially the Aronia company under a new name. More than half its stock is held by the old stockholders by virtue of their ownership of the old stock, without any other consideration. On the view of the question that appellees assume to be contended for, they have argued that the same law as to the use of its assets to pay its debts should be applied to a corporation as to an individual, even to the extent of sanctioning preferences, and this might be conceded without really touching the case. But the illustration, if appropriate, is fatal to the appellee; for in the case of an individual, a transfer to his wife or his agent, or anybody who should merely represent himself under another name, would be unquestionably void against creditors. The only real difficulty in the present case is, whether the stockholders are so completely severed, in the view of the law, from the corporation behind which they hide, as to prevent a creditor from asserting their identity in fact, for the purpose of securing payment out of property which was theirs under one name, and is still theirs under another. Is the Montgomery company so completely a new and different person from the Aronia company that the law must close its eyes to the fact that the difference is a mere juggle of names? We do not think there is any compulsion to such legal blindness. Settled general principles, and the analogies of the law, are

against such a contention. If the corporation had merely changed its name, there could have been no doubt of the continued liability of the property. As already said, a majority of the stockholders in the new company are simply the stockholders of the old company holding as such, and without other consideration. As to these, it has been a mere change of name. As to the other or new stockholders, it appears from the agreed facts that they were creditors of the old company, and hold their present stock solely in consideration of their former claims as creditors. They paid nothing else for it; and they must have known that the new corporation into which they entered in this way was not a new enterprise, in the regular course of business under the incorporation act of 1874, as it professed to be, but a new turn in the old enterprise, all of whose property was being practically handed over, not to them alone in payment, which they might perhaps rightfully have accepted, but to them in conjunction with their late debtors. Under such circumstances, they were bound to take notice of the nature of the transaction, and to know that equity would still regard the property as a trust for the payment of existing debts, and would follow it on behalf of creditors until it should get into the hands of innocent purchasers for value. Such purchasers they were not. The old stockholders were not purchasers for value at all; and the new stockholders were not innocent, for they knew, or were bound to take notice, of the taint in their co-adventurers' title. We are of opinion that as to the stockholders in the Aronia company, this was a transfer of property by a debtor with the retention of an interest in himself, within the settled rule of law that makes such transfers void against creditors, and that as to the Aronia creditors who became new stockholders in the Montgomery company, they took with such notice as prevents them from claiming now as innocent holders for value against the appellants as execution creditors of the old corporation. It is not worth while to cite authorities for these principles. They are settled and familiar. The only question that can be made is upon their application; and the novelty in this, if there be any, is simply the novelty of circumstances.

The only case of similar facts that has been found is *Hibernia Ins. Co. v. St. Louis Trans. Co.*, 13 Fed. Rep. 516, and in that the circuit court of the United States reaches a similar conclusion. "This court holds," says McCrary, C. J., "that the sale by the Babbage company of all its property to another

corporation, composed mostly, if not wholly, of the same persons, was fraudulent and void as to all creditors of the former company not assenting thereto. . . . The fair inference from the transaction is, that the old company was about to be dissolved, and to cease to be. It was to be absorbed by the new company. This is the inevitable consequence of the formation of the new company, composed substantially of the same persons, to transact the same business, at the same places, and with the same property. By the transfer, the creditors of the old company were deprived of the means of enforcing their claims. . . . Equity will not compel the creditor of a corporation to waive his right to enforce his claim against the visible and tangible property of the corporation, and to run the chances of following and recovering the value of shares of stock after they are placed on the market." And Treat, D. J., added: "A corporation . . . cannot change its name, or assume the form of a new corporation, and thus escape its obligations." The court drew a distinction between an individual and a corporation, as to parting with all its assets even for the payment of *bona fide* debts, and not only held the transfer void even irrespective of the identity of the stockholders, but held the new corporation liable to the creditors of the old to the extent of the assets so received. It is not necessary for us to go so far. We only hold that, under the circumstances, specific property of the old corporation may be followed, as in other cases of transfers fraudulent as to creditors.

It is said in appellee's argument that the whole of the property of the Aronia company was not sold. But in fact the portion left was not enough to pay the landlord's preferred claim for rent; and as to this creditor, the transfer was of all the available assets, and left him nothing within reach for payment of his claim.

Judgment reversed, and now judgment for defendant on the point reserved.

CORPORATIONS — CONSOLIDATION. — As to the effect of the consolidation of two corporations upon the liabilities of the new company, see note to *McMahon v. Morrison*, 79 Am. Dec. 426, 427.

FRAUD — EVIDENCE. — The question of fraud is one of fact: *Oliver's Bank v. Bolen*, 121 Ind. 301. Fraud is seldom capable of direct proof: *Ross v. Miner*, 67 Mich. 410. Yet it will not be presumed unless the circumstances exclude the inference against it: *Keagy v. Trout*, 85 Va. 390. In *Russell v. Huiskamp*, 77 Iowa, 727, the rule is laid down that fraud may be proved by circumstances which naturally lead to the conclusion of its existence, and that

an instruction is erroneous which tells the jury that proof must be such as to make the inference of fraud irresistible. Single facts standing alone can hardly show fraud, but may, taken together, and in connection with all the surrounding circumstances, do so, and they should always be so considered: *Arnstine v. Treat*, 71 Mich. 561.

ESTATE OF CHRISTIAN NAGLE

(184 PENNSYLVANIA STATE, 61.)

ALTERATION OF NEGOTIABLE PAPER, BURDEN OF EXPLAINING, ON HOLDER WHEN. — Where the sizing and a portion of the paper on which a check is written have been removed in that part of the paper where the amount is written and the words written on the rubbed or scraped part of the paper are cramped and crowded so as to fit the same space, these facts are sufficient to impose the burden of explaining them upon the holder of the check, although it does not appear that such words were written over any particular amount previously written on such space. Where there is apparent evidence of the alteration of a negotiable instrument in the place where the amount or the date should be written, the complete obliteration of all traces of the words of the genuine instrument does not shift the burden of proof from the party offering the instrument in evidence to the party alleging the alteration. And the application of this rule is not affected by the fact that both parties to the transaction are dead.

PRESUMPTION AS TO ERASURES ON NEGOTIABLE INSTRUMENTS. — In the absence of evidence, the maker of a negotiable instrument is presumed to have issued it free from all blemishes, erasures, and alterations, and the burden of showing that it was defective when issued is upon the holder. The presumption of law in favor of innocence does not extend to the alteration of negotiable instruments.

THE amount of the check referred to in the opinion was one of the items of credit in the account of the executrix of James E. Nagle, deceased, who was the executor of Christian Nagle, deceased. The orphans' court appointed an auditor to examine, and if necessary restate, the account. Certain legatees under the will of Christian Nagle objected to this credit before the auditor, whereupon the following check was offered in evidence: —

"No. —.

EASTON, PA., September 19, 1888.

"FIRST NATIONAL BANK.

"Pay to James E. Nagle.....or bearer,
the sum of four thousand²³/₁₀₀.....dollars.

"\$1422.00.

CHRISTIAN NAGLE.

"Indorsed: JAMES E. NAGLE."

Other facts are stated in the opinion.

O. H. Meyers, for the appellants.

William Mutchler, for the appellee.

CLARK, J. When the check which is the subject of controversy in this case was presented to the auditor for adjudication, it was objected to, upon the ground that there was an alteration in the amount; that the alteration was apparent and manifest upon the face of the check; and that the burden was upon the holder, before the check could be received in evidence, by competent proofs, to explain it, and to show, either that the alteration was made before its execution, or afterwards, with the consent of the drawer. The auditor, however, was of opinion that the check did not exhibit on its face any material alteration. Admitting that where the alleged alterations appeared the face of the paper had been scratched or scraped, he was not able to discover that the amount of the check had been written over any other amount previously written; that is to say, although the check was manifestly blurred and disfigured at the place of the alleged erasure, yet there was not, upon the face of the paper, any apparent alteration of the amount. "The witnesses testify," says the auditor, "that they can see that the paper had been scratched, and that the ink blurred and appeared to have been written over an erasure; what had been erased they do not pretend to say; it may have been a blot of ink, or the wrong word may have been written and immediately scratched out, and thus the ink blurred. It certainly does not appear, either to the naked eye, or from an examination under the microscope, that it was written over any particular amount previously written." The check was therefore received in evidence, and was, without any explanation, allowed in the distribution. The learned judge of the court below, in passing upon the report of the auditor, says: "Now, an alteration is defined to be an act done upon the instrument, by which its meaning or language is changed: 1 Greenl. Ev., sec. 566. Where does it appear on the face of this check that it ever conveyed a different meaning, or spoke a different language, from what it does to-day? It is said that the letters 'teenhun' are written over an erasure. If that is so, the check does not disclose it, and at this stage of the inquiry we can look no further. All that the check shows is, that the face of the paper, where those letters appear, had been scraped before the letters were written. It is admitted that not the

slightest trace of any previous matter, either written or printed, can be discovered at this point. To erase is 'to rub or scrape out; as letters or characters written, engraved, or printed': Webster. The scratching or scraping of the surface of blank paper is not an erasure, in any accepted sense of that term. We think, therefore, that the learned auditor did right in receiving the check in evidence."

If the rule be as stated by the learned judge, the success in completely obliterating all traces of the words of the genuine instrument, although there may be other evidences of alteration apparent, shifts the burden of proof from the party offering the paper in evidence to the party alleging the alteration. This would, in effect, we think, be to offer a premium upon the forger's skill. If there be apparent proof on the face of the paper that an alteration has been made in the place where the amount or the date of a check or note should be written, it must be supposed, *prima facie*, that it was the amount or the date which is altered, and that the alteration is to the prejudice of the party executing it. If this were not so, it would, in all cases, fall upon the drawer of the check or the maker of the note, in the first instance, to show what was the matter erased, before the holder is required to explain what is otherwise manifest, viz., that the instrument has been altered in a material part.

At the argument of the cause in this court, the check was produced, and submitted to our inspection; photographic copies were also provided, and we have thus been afforded the same opportunities for examination of the paper as the auditor or the court below. The mere fact that some of the words of a writing appear to have been written upon paper, where it has previously been rubbed or scraped, and that the ink has run so as to create a blurred appearance,—that, and no more, might not, perhaps, import any alteration, although this occurred in a material part; but the fact that an erasure has been made, where the surface of the paper has been scraped, may become apparent from various facts exhibited on the face of the paper itself; the writing upon the erased surface may be with a different pen, in different ink, or in a different hand, or the words may be crowded and cramped to fit the space originally occupied. The mere roughness of the surface is not likely to affect the general style and spacing of the words, but when certain words are erased, and others are inserted in lieu thereof, in a space either too small or too large to receive them, the alteration is

usually inserted in such a cramped or crowded manner, or in such extended form, as to plainly indicate the alteration. Simple faults in writing, blots, or blemishes are, in most cases, thus readily distinguishable from an alteration in the body of the instrument, whether made fraudulently or in good faith. That this check was scraped or rubbed, as if to erase something, is patent and plain; indeed, that is not disputed. The sizing and a portion of the surface of the paper have been removed; at this particular place the paper is so thin that, holding it to the light, one may almost see through it; whereas the other portions of the paper are quite perfect; the marks of an instrument with a sharp edge are plainly visible. The allegation is, that the check, originally, was for \$422 (although written four hundred ¹⁰⁰/₁₀₀ dollars), and was raised to \$1,422. It is plain that the words "the sum of four . . . ¹⁰⁰/₁₀₀" are unaltered. They are undoubtedly just as they were originally written. It is very remarkable that where the writer had plenty of room, and to spare, in the line devoted to the amount, and he started out apparently to occupy it, that he should stop at the place of the erasure, in the middle of a word, and from that point cramp and crowd the words or letters, as if the space was limited. It will be observed, also, that the crowding of the letters and contracting of the spaces is confined to the place where the paper was scraped; that the space covered by the alleged erasure is just sufficient to contain the word "hundred" with the usual spacing, and the letters "dred" appear to be written upon the space between the "¹⁰⁰/₁₀₀" and the word preceding, where no erasure was made; that after the word "four" there is apparent a remnant of the matter erased, and that the letters "teen" appear to have had no connection with "four" until after the erasure, the hair-line finish of the "r" having been formed as if that letter was the last one of the word. It is also a singular coincidence that the figure "1," in the figures on the corner, denoting the amount of the check, is very close to the (\$) dollar-mark, and is of a much darker shade or color than either of the other figures, which are alleged to have been made at the same time, with the same ink and the same pen. The general appearance is that of an altered paper. The alteration, we think, is manifest and apparent at the first glance, and a critical and careful examination confirms this impression. The alteration may have been made at the time, with the knowledge and approval of the parties; but as the writing, including the altera-

tion, is in the hand of the payee, it is the duty of the holder to explain it. It is unimportant that both parties to the transaction are dead; an explanation is thereby rendered more difficult, perhaps, but the security and safe transmission of negotiable paper demand that the rule so well established in our decisions shall be maintained. The maker of negotiable paper is always presumed, in the absence of evidence, to have issued it clear of all blemishes, erasures, and alterations, and the burden of showing that it was defective when issued is upon the holder: *Heffner v. Wenrick*, 32 Pa. St. 423. As a general rule, the law presumes in favor of innocence; but this presumption does not extend to the alteration of negotiable instruments. "He who takes a blemished bill or note takes it with all its imperfections on its head. He becomes sponsor for them, and though he act honestly, he acts negligently. But the law presumes against negligence as a degree of culpability; and it presumes that he had not only satisfied himself of the innocence of the transaction, but that he had provided himself with the proofs of it, to meet a scrutiny he had reason to expect": *Simpson v. Stackhouse*, 9 Pa. St. 186; 49 Am. Dec. 554. To the same effect are *Paine v. Edsell*, 19 Pa. St. 178; *Clark v. Eckstein*, 22 Pa. St. 507; 62 Am. Dec. 307; *Miller v. Reed*, 27 Pa. St. 244; 67 Am. Dec. 688; and many other cases.

The distinction as to the province of the court and of the jury, excepting as it may involve the question of the burden of proof, is rendered unimportant by the fact that the auditor in the first instance, and the learned judge afterwards, performed the functions of both court and jury. The check was not only received in evidence, but it was allowed in the distribution, without any explanation whatever. We are of opinion that the decree in this case cannot be sustained.

The decree of the orphans' court is therefore reversed, and the record remitted for further proceedings, the appellee to pay the costs of this appeal.

ALTERATION OF INSTRUMENTS — NEGOTIABLE INSTRUMENTS. — The burden of proving an alteration in a draft, after its execution, rests upon him who alleges it; but the burden shifts from him to his adversary, where the draft appears upon its face to have been altered in any substantial particular: *Harris v. Bank*, 22 Fla. 501; 1 Am. St. Rep. 201. The burden of proof is upon the maker of a promissory note to show that an alteration therein was made after its delivery: *Wilson v. Hayes*, 40 Minn. 531; 12 Am. St. Rep. 784. But the holder must prove that an alteration was innocently made: *Crossell v. Labrec*, 81 Me. 44; 10 Am. St. Rep. 228, and note. For a party claiming under a negotiable instrument must remove any suspicion as to its

alteration: *National Ulster County Bank v. Madden*, 114 N. Y. 280; 11 Am. St. Rep. 633, and note; *Devees v. Bluntner*, 70 Tex. 406; *Rodriguez v. Haynes*, 76 Tex. 225. But where there is nothing suspicious upon the face of a negotiable instrument, raising a presumption that an alteration appearing therein was made after its execution, it is not obligatory upon the one introducing the instrument to show that such alteration was made before the execution of the paper, for the presumption is to the contrary: *Brand v. Joharowse*, 60 Mich. 210.

STARCK v. UNION CENTRAL LIFE INSURANCE CO.

[124 PENNSYLVANIA STATE, 45.]

SUICIDE OF INSURED DEFENSE TO ACTION ON POLICY WHEN. — Where a policy of life insurance contains a condition that in case the insured shall die by his own hand, whether sane or insane, the policy shall become null and void, the suicide of the insured will bar a recovery on the policy, notwithstanding another condition of the policy provides that the policy shall be subject to the provisions of a statute which enacts that "all companies, after having received three annual premiums on any policy issued on the life of any person in this state, are estopped from defending, upon any other ground than fraud, against any claim arising upon such policy by reason of any errors, omissions, or misstatements of the assured, in any application made by such assured, on which the policy was issued, except as to age." The latter condition does not affect the former one, but relates solely to defenses based on errors, omissions, or misstatements in the application.

ASSUMPSIT. The opinion states the case.

Charles F. Walter, and W. M. Ramsey, for the appellant.

H. J. Steele, for the appellee.

STERRETT, J. In his statement, plaintiff claimed two thousand dollars, the full face value of the policy. The company, in its affidavit of defense, averred that the insured, by reason of his having committed suicide on July 27, 1889, violated the eighth condition of his policy, and thereby rendered the same null and void except as to the sum of \$74.52, the "reserve value" of the policy, which is protected by the ninth condition thereof. The eighth condition, above referred to, provides "that in case the insured shall die by his own hand, whether sane or insane, . . . this policy shall become null and void."

The plaintiff, having elected to take judgment for the reserve value admitted to be due, and proceed for the residue, entered a rule for judgment for want of a sufficient affidavit of defense. The rule was afterwards made absolute, and judgment entered accordingly. From that judgment this appeal

was taken, and the only question for our consideration is, whether the court below erred in construing the thirteenth condition of the policy, and holding that the company was estopped by its provisions from insisting on the bar of the eighth condition, above quoted. The thirteenth condition is as follows: —

“Whether the insured reside in Ohio or elsewhere, this policy is issued subject to the following named section of the Ohio Revised Statutes: ‘Section 3626. All companies, after having received three annual premiums on any policy issued on the life of any person in this state, are estopped from defending, upon any other ground than fraud, against any claim arising upon such policy by reason of any errors, omissions, or misstatements of the assured in any application made by such assured on which the policy was issued, except as to age.’”

It was conceded that the three annual premiums were paid by plaintiff's intestate, and if the learned president of the common pleas was right in his construction of the thirteenth condition, the company was estopped from enforcing the bar of the eighth condition of the policy in this case; but we are of opinion that he was mistaken as to the scope and effect of the thirteenth condition. In our opinion, it has no effect whatever on the eighth condition.

The condition in question is not as clearly expressed as it might have been, and its meaning is further obscured by the omission of a comma after the words “such policy.” Formerly, it was unusual to punctuate legislative acts and deeds, but in construing them the courts always read them with such stops as gave effect to the whole: 4 I. R. 65. It is well settled that neither punctuation nor the absence of points is to be seriously regarded in the construction of statutes. It was intended by the condition under consideration that the company, after having received three annual premiums, should be estopped from defending, etc., on the ground that errors, omissions, or misstatements were made by the assured in the application on which the policy was issued, unless such errors, omissions, or misstatements were of such a character as to amount to actual fraud, excepting, however, misstatements as to age, whether fraudulently made or not. In other words, the thirteenth condition relates solely to defenses based on errors, omissions, or misstatements in the application, and with the exception of errors or misstatements as to age, it debars the company from defending on either ground, in case the er-

ror, omission, or misstatement was inadvertently or innocently made; but it does not prohibit the company from defending on the ground that the errors, omissions, or misstatements were fraudulently made, or on the ground that error or misstatement as to age was actually made, whether fraudulently or not.

We find nothing in any of the provisions of the policy that was intended to estop the company, in any case of suicide, from setting up the bar to the eighth condition, except to the extent of the "reserve value" of the policy, to which reference has already been made.

Judgment reversed.

LIFE INSURANCE — SUICIDE. — Suicide is not recognized as a defense to an action upon a policy for life insurance, unless it has been so stipulated in the policy: *Darrow v. Family Fund Soc.*, 116 N. Y. 537; 15 Am. St. Rep. 439, and note 426, 437. See extended note to *Breaded v. Farmers' L. & T. Co.*, 59 Am. Dec. 487-497, upon the effect of the suicide of an assured on the right to recover on a life insurance policy.

ESTATE OF FESMIRE.

[124 PENNSYLVANIA STATE, 67.]

TRUSTEE NOT LIABLE FOR LOSSES OCCASIONED BY BAD FAITH OR CRIME OF HIS CO-TRUSTEE. — A trustee does not, by virtue of his acceptance of a trust, become an insurer of the trust funds against the possibility of loss, nor a surety for his co-trustee. His undertaking is personal, requiring of him good faith and reasonable diligence, and if these requirements are met, he is not liable for losses occasioned by the bad faith or the crimes of his co-trustee.

TRUSTEE LIABLE FOR EMBEZZLEMENT OF TRUST FUND BY HIS CO-TRUSTEE WHEN. — Where two of three trustees of a fund directed to be invested in good real estate security put it into the power of a third trustee to collect the principal of a mortgage belonging to the trust, it is their duty to see that such principal is properly reinvested. And if they neglect this duty, and the money is, through their neglect, lost by the embezzlement thereof by their co-trustee, they will be liable for the loss.

TRUSTEE NOT LIABLE FOR FRAUD OF HIS CO-TRUSTEE WHEN. — Where two of three trustees leave with the third trustee securities belonging to the trust, which he embezzles, if they have not done or omitted to do anything which has contributed to render the fraud possible, they will not be responsible for its consequences.

CO-TRUSTEES LIABLE FOR EMBEZZLEMENT OF TRUSTEE MAY APPLY PROCEEDS OF SECURITIES GIVEN THEM BY HIM AS HE DIRECTS. — Where a trustee who has embezzled trust funds, for a part of which his co-trustees are liable on the ground of their negligence, puts in the hands of his co-trustees such securities as he has, confesses judgment in their

favor for the amounts embodied, and directs that the moneys to be collected from such securities shall be appropriated to the payment of the amount for which the co-trustees are liable, they have the right to apply it as he has directed.

THE facts are stated in the opinion.

W. Horace Hepburn and Theodore W. Bean, for the appellants.

Charles Hunsicker and James H. Shakespears, for the appellee.

WILLIAMS, J. The testator died in May, 1873. He directed his executors to convert his estate, real and personal, into money, and as to one third of the proceeds, to invest the same in "good real estate securities," and pay the income thereof semi-annually to his wife, Jane Fesmire, during her natural life, and after her death, then over to his children or their representatives, absolutely. He named his executors in these words: "I nominate and appoint my friend Josiah Kerper, my son, Peter Fesmire, and my son-in-law Ephraim Magargal, the executors of this my last will and testament." In June, 1875, the executors settled their account in the orphans' court, showing the performance of the duties imposed by the will in the sale of the property of the testator and the appropriation of the proceeds, and that they had ready for investment the one third of the entire fund, amounting to \$7,306.12, for the purpose of raising an income for the widow. This account was confirmed. The fund in hand was then invested in three mortgages, which, it is conceded, were "good real estate securities," and the executors held these mortgages thereafter as trustees under the trust created for Jane Fesmire by the terms of the will. Kerper lived near the widow, had been the trusted friend of the testator for years, was in active business, and apparently a prosperous man. Fesmire, the son, lived in another part of the county, and at a considerable distance from the widow. Magargal lived in the state of Delaware. Both were farmers, in moderate circumstances, living on and cultivating their farms. Neither of them was able to attend to the collection of the interest on the mortgages and its payment to the widow, without considerable inconvenience and expense. The mortgages were therefore left in the custody of Kerper, as the one of their number most conveniently situated and best qualified to act in the premises, and he undertook to collect and pay over the interest. For about ten years he dis-

charged the duty faithfully, and made prompt payment of the interest collected. In October, 1885, he failed to pay the interest falling due, and the widow at once made complaint to Fesmire and Magargal. They gave the subject prompt attention, and soon learned, to their great surprise, that Kerper had attempted to embezzle the proceeds of all the mortgages, and was in failing circumstances. They at once began proceedings to remove Kerper from the trust, and to recover the trust funds. The widow is now endeavoring to hold them responsible for the interest which the money embezzled by Kerper should have earned if he had not gotten it into his own hands, and the court below held that they were liable to her for it, although no part of it has ever come into their hands. It is from this ruling that the appeal in this case was taken.

The general rule in relation to the liability of co-trustees is well settled in this state. They are responsible, ordinarily, for their own acts and omissions, but not for those of their associates. So an executor will not be liable for a *devastavit* committed by his co-executor, unless he has contributed in some manner to it: *Brightly's Equity*, 359. The statement of the rule, by Coulter, J., in *Hall v. Boyd*, 6 Pa. St. 270, is referred to by several of the later cases as the best statement of the rule to be found in our books, and it is cited with approval so recently as *Wilson's Appeal*, 115 Pa. St. 95. It is, in substance, that the act of one of several executors in relation to the testator's goods, as in making sale, delivering possession, or receipt of the price, is the act of all, as all have authority to do the act; but each is liable individually no further than assets have come to his hands, except for his own fraud or negligence. It may be necessary for trustees to join in executing receipts for money in many cases, but the fact that they do so join is not conclusive evidence that they are jointly liable; for in the absence of fraud and negligence, each will be held liable only for what he actually receives: *Stell's Appeal*, 10 Pa. St. 149; *Wilson's Appeal*, 115 Pa. St. 95. The law requires of a trustee fidelity to the trust, and the exercise of the same measure of diligence that a man of ordinary prudence may be expected to exercise in the care of his own property under the same circumstances: *Jones's Appeal*, 8 Watts & S. 143; 42 Am. Dec. 281. A trustee does not become, by virtue of his acceptance of the trust, an insurer of the trust funds against the possibility of loss, nor a surety for his co-trustee. His undertaking is personal, and requires of

him good faith and reasonable diligence. If these requirements are met, he is not liable for losses occasioned by the bad faith or the crimes of his co-trustees. The appellants must be judged by this standard.

The trust funds in this case were invested in three mortgages. One of these was for \$4,000, one for \$2,500, and one for \$806.12, to which we will refer as Nos. 1, 2, and 3, respectively.

In October, 1883, Kerper represented to his co-trustees that the land covered by mortgage No. 1 had been sold by the owner, who wished to pay the money, and have the mortgage satisfied to enable him to make title to the purchaser. He stated at the same time that he had an opportunity to loan the money again on real estate in Norristown. At his instance, both Fesmire and Magargal executed an assignment of the mortgage, and left it in his hands to enable him to satisfy it. He received the four thousand dollars, and instead of reinvesting it, he embezzled it, but paid the interest regularly until October, 1885, to the widow. Neither Fesmire nor Magargal gave any attention to the reinvestment of this money, and both of them were ignorant of Kerper's misconduct, until they discovered it after notice from the widow that she had not been paid the interest due her in October, 1885. During the two years intervening, Kerper was in active business and in good repute; and as he paid the interest punctually, there was nothing to call the attention of the appellants to this subject. But when they put it in Kerper's power to collect the money on the mortgage, it became their duty to see that it was again invested in "good real estate security"; and if they had not neglected this duty, the loss would not have been sustained. They did neglect it. The embezzlement was made possible because they neglected it, and their liability grows out of their negligence. We think the learned judge of the court below was right in holding them liable for the loss of the proceeds of mortgage No. 1.

An examination of mortgage No. 2 disclosed the fact that Kerper had received the money due upon it, and attempted to satisfy it by his individual receipt. He never consulted his co-trustees in regard to the satisfaction of this mortgage, and when they discovered what he had attempted to do, they promptly disavowed his act, and began proceedings for the enforcement of the lien and the collection of the money, which are still pending. If the money is collected, it will be their duty to see

to its investment at interest, as required by the will. If it is not collected because of the fraud of Kerper, they have neither done nor omitted to do anything which has contributed to render that fraud possible, or which can make them responsible for its consequences.

Precisely the same thing is true of mortgage No. 3. The appellants knew nothing of Kerper's effort to get the money due upon it into his hands, until they learned it in the course of their investigations in the fall of 1885. It was a circumstance they had no reason to anticipate, and they are chargeable with no negligence in regard to it. The arrangement under which these mortgages were left in the possession of Kerper, and he authorized to receive the interest upon them for the benefit of the widow, was, in the light of all the circumstances that led to it, a reasonable and proper one. For ten years it was a satisfactory one. It is not now alleged that it was improvidently made, or that suffering the securities to remain in the hands of their co-trustee, who, equally with themselves, was entitled to their custody, was an act of negligence on the part of the appellants. There is, therefore, no reason for holding them personally liable for Kerper's embezzlement, or his attempt to embezzle the proceeds of mortgage No. 3.

The wrong that has been done has been the work of Kerper alone, so far as mortgages Nos. 2 and 3 are concerned. As to No. 1, the appellants put it in his power to satisfy the mortgage, and take the proceeds into his own hands; and then they neglected to perform the duty which the will imposed, viz., to see to its investment in good real estate securities. Because of this neglect, they are liable for the amount of mortgage No. 1. Their duties as trustees require them to be vigilant and active in their efforts to recover on mortgage No. 2, and to convert into money the securities received from Kerper for the purpose of indemnifying them against his embezzlements. They must use due diligence to restore the trust funds, and provide an income for the widow; but they cannot be compelled to pay out money which they never received, and for the loss of which they are not accountable.

A question is raised over the contract between Kerper and the appellants, bearing date March 31, 1886. When charged with his embezzlements, Kerper put such securities as he had in the hands of his co-trustees; and by the contract between himself and them, he directed in what manner the money obtained on the securities should be applied. The order of

application was, first, to the payment of the four thousand dollars received on mortgage No. 1, which was wholly lost to the trust unless it could be realized from the securities which he turned over under the terms of this contract; next, to the payment of the amount of mortgage No. 3, which had been received by him as the result of legal proceedings taken for its collection; last, to the payment, either to the trustees or to the mortgagor, if compelled to pay the mortgage by virtue of the proceedings now pending, of the amount of mortgage No. 2. As these securities were furnished by Kerper, he had a right to direct their appropriation. In the exercise of that right he seems to us to have acted properly, and to have been just to his co-trustees, without the least unfairness towards his *cestui que trust*. The wrong done by him was in the attempt to embezzle the entire fund, which, as trustee, it was his duty to protect. The contract of March 31, 1886, was an effort to make amends for this wrong, and restore the fund, as far as the securities would reach; and the appellants have a right to apply the moneys received upon them in accordance with the terms of the contract.

The decree is reversed, and record remitted, with directions to restate the account in accordance with this opinion.

TRUSTS AND TRUSTEES—LIABILITY OF TRUSTEE FOR ACTS OF CO-TRUSTEES. — For a discussion of the liability of a trustee for the acts, defaults, and breaches of trust of his co-trustee, see note to *Jones's Appeal*, 42 Am. Dec. 233-291; *Bruss v. Gillet*, 115 N. Y. 10; 12 Am. St. Rep. 764, and note.

CREW v. BRADSTREET COMPANY.

[184 PENNSYLVANIA STATE, 161.]

EXEMPTIONS FROM LIABILITY FOR NEGLIGENCE, CONTRACTS STIPULATING FOR, STRICTLY CONSTRUED. — Contracts stipulating for exemption from liability for negligence are not favored by the law, and in some instances, as in the case of common carriers, they are prohibited as against public policy. In all cases, such contracts should be strictly construed, with every intendment against the party seeking their protection.

COMMERCIAL AGENCY LIABLE FOR NEGLIGENT PUBLICATION OF MISSTATEMENT WHEN. — A company doing business as a commercial agency is liable to a subscriber for injury occasioned to him by his relying on a misstatement as to the financial condition of a party, which it negligently prints in a book published by it for circulation among its subscribers, notwithstanding the contract, between such company and the subscriber stipulates that the company shall not be liable for any loss or injury caused by the neglect or other act of any officer or agent of the company in procuring, collecting, and communicating such information, and that

the company does not guarantee the correctness of such information, when the information furnished to the company by its officers and agents is correct, but the mistake is the blunder of the company in erroneously printing it in the book.

ACTION to recover damages for negligence. The book referred to in the opinion was purchased by the plaintiffs from the defendant for the sum of one hundred dollars. At the close of the plaintiffs' testimony, the court granted a motion for a nonsuit. The other facts are stated in the opinion.

Theodore F. Jenkins, for the appellants.

Isaac S. Sharp and S. H. Alleman, for the appellee.

PAXSON, C. J. It is not denied that the book furnished the plaintiffs by the Bradstreet Company contained a serious error. The Union Refining and Manufacturing Company, of Jersey City, was therein rated as having six hundred thousand dollars capital actually paid in, whereas in fact that was the amount of its authorized capital, of which only twenty thousand dollars had been paid in. This was explained by the Bradstreet Company as a typographical error. The plaintiffs allege that on the faith of the statement contained in the book they sold the Union Refining and Manufacturing Company a bill of merchandise amounting to \$1,457.47, which has been wholly lost by reason of the insolvency of said company. The defendants contend that they are protected by the following provision of their contract with the plaintiffs: "That the said company shall not be liable for any loss or injury caused by the neglect or other act of any officer or agent of the company in procuring, collecting, and communicating said information; that the said company does not guarantee the correctness of the said information," etc.

Contracts against liability for negligence are not favored by the law. In some instances, such as common carriers, they are prohibited as against public policy. In all cases, such contracts should be construed strictly, with every intentment against the party seeking their protection. This contract provides for exemption from the negligence of the officers and agents of the company, but not from its own. We think the fair and reasonable construction of it is, that the company should not be liable for the mistakes of those who collect and impart the information. Thus if the company had been informed by the person who gave them the report as to the Union Refining and Manufacturing Company that it had six hundred thousand dollars of paid-up capital, and this state-

ment had been furnished as received, we think the defendants would not have been responsible. Information as to the financial standing of individuals, firms, and corporations is sometimes difficult to procure, and cannot in all instances be entirely accurate. It is a delicate inquiry always, and involves the employment of a large number of agents scattered over a wide extent of country. In some instances the information furnished may not only be erroneous, but willfully false, to gratify the private malice of the informant against the subject of the inquiry. The contract referred to was evidently intended to protect the company from the consequence of errors, from whatever cause, in the collection and transmission of such information by its agents. Hence if the company communicates such information as it was received, it may well claim protection under the contract, even though such information should subsequently appear to have been erroneous. Its duty is to give the information which it receives, in good faith, to its customers, or to those who apply for it. In this case, however, the contention is, that the report made to the company by its agent was correct, and that the mistake was the blunder of the company in having it erroneously printed in its July book. This book was certainly issued by the company; it cannot be said to be the act of any particular officer or agent, as would be the sending of information as to the standing of a particular individual, or by the transmission of such information by a clerk, in the course of his routine duties, to a subscriber or customer. The contract was against the negligence of particular officers or agents, not against the negligence of the company as such. It was certainly negligence on the part of the company to issue a book containing such a gross error; not the error of the agent who furnished the information, — for he furnished it truly, — but of the company in sending it out falsely.

It was urged, however, that the Bradstreet Company, if liable at all, were only so as guarantors, and that as the plaintiffs had commenced no suit against the refining company, they are not entitled to recover against the defendant in this action. We need not discuss this proposition, in view of the evidence that the refining company is insolvent.

The judgment is reversed, and a *venire facias de novo* awarded.

CONTRACTS LIMITING LIABILITY FOR NEGLIGENCE. — A carrier cannot limit its liability for negligence by entering into a contract to that effect: *Alabama etc. R. R. Co. v. Thomas*, 89 Ala. 294; 18 Am. St. Rep. 119, and note.

WHITAKER v. RICHARDS.

(184 PENNSYLVANIA STATE, 191.)

BOND SIGNED BY PART OF SURETIES NAMED IN IT BINDS THOSE WHO SIGN WHEN. — Where part only of the sureties named in a bond execute it, those who do execute it will be bound, unless they sign it upon condition that they are not to be bound unless the other sureties named therein also sign it.

BOND PREPARED FOR TWO PARTNERS, BUT SIGNED BY ONE ONLY, BINDS HIM WHEN. — Where a bond is prepared for two partners, but is signed by one only, with the expectation, but not upon the condition, that it will be signed by the other, the partner who signs will be bound.

ASSUMPSIT upon a bond of indemnity. *Plea, non assumpsit.* There was a verdict and judgment for the plaintiffs, and the defendants appealed. Other facts are stated in the opinion.

John G. Johnson and G. Harry Davis, for the appellants.

Josiah R. Adams, for the appellees.

PAXSON, C. J. The weak spot in the defense set up below is to be found in the fact that there was no evidence to show that when Watson signed the bond in controversy he did so upon the condition that he was not to be bound unless his partner, Gillingham, also signed it. The defendants contended that the bond was intended to bind, not only the firm of Watson and Gillingham, of which firm Watson was a member, but that it was also contemplated that Mr. Magee should sign as a co-surety. The bond sets forth the name of Alexander T. Richards as principal, and of "R. J. Watson and F. C. Gillingham, trading as Watson and Gillingham," as sureties, but there is no mention of Magee's name; and so far as his alleged omission to sign is concerned, the defense, under all the authorities, is without merit.

We have no occasion to go outside of our own state for authority upon this question. *Sharp v. United States*, 4 Watts, 21, 28 Am. Dec. 676, was the case of a bond given in pursuance of an act of Congress which required that it should be executed by two or more sureties. It was signed by one surety only. He had a right to suppose the bond would be executed in accordance with the act of Congress, and it was held that there could be no recovery against him alone. In *Fertig v. Bucher*, 8 Pa. St. 308, the party who executed the bond expressly stipulated that it should not be delivered until twelve names had been obtained to it, and the agent of the obligee so promised; it was held that the bond remained

in the hands of the agent as an escrow, and until the condition was performed there could not be a valid delivery of it. In *Keyser v. Keen*, 17 Pa. St. 327, the bond was prepared for six persons to sign, but was executed by five only. It was found in the possession of the obligee, and it was held that it was not to be implied that it was incomplete, and not binding on those who executed it. *Grim v. School Directors*, 51 Pa. St. 219, was the case of a joint and several bond prepared for signatures by four persons named, but signed by three only. The absence of the signature of the third was held not to be a defense against payment by the three. To the same point is *Simpson v. Bovard*, 74 Pa. St. 354. *Warfel v. Frantz*, 76 Pa. St. 88, and *Keener v. Crago*, 81½ Pa. St. 166, are upon all fours with *Fertig v. Bucher*, 3 Pa. St. 308. There was an express stipulation that the bond was not to be delivered until all had signed.

The evidence shows that it was the intention of Watson to bind his firm, as sureties, when he went to execute the bond. He expected to sign the firm name for that purpose, but was told that the members of the firm must sign their individual names. As the bond was under seal, his signature would have bound himself, but not his firm. He signed his own name, with the expectation that his partner would also sign. For some reason he omitted to do so. Does the fact that Watson expected his partner to execute the bond, and that the firm should thus be held, relieve him from liability? We think not. He made no such stipulation or condition at the time. He might have done so, and thus have protected himself, under the authority of *Fertig v. Bucher*, 3 Pa. St. 308, and the other cases cited. When a man signs the firm name to an instrument under seal, he always expects to bind his firm. But he does not do so. He binds only himself. The fact that he intended and expected that his partners should be bound equally with himself has never been held to relieve him from individual liability. In what respect does this case differ in principle? And is not Watson in the precise condition as if he had signed the firm name to this bond, intending to bind his firm, yet only binding himself? The argument of the learned counsel for the defendants, while ingenious and plausible, has failed to satisfy us that the court below committed error, either in admitting the bond in evidence or in the answers to points.

Judgment affirmed.

EFFECT OF INSTRUMENT SIGNED BY PART ONLY OF THOSE NAMED THEREIN AS PERSONS TO BE BOUND BY ITS PROVISIONS. — As to the validity and binding effect of a bond which is not signed by all who were expected to sign it, see extended note to *Sharp v. United States*, 28 Am. Dec. 679-681; *Ward v. Churn*, 18 Gratt. 801; 98 Am. Dec. 749, and note; *Nash v. Fugate*, 32 Gratt. 595; 34 Am. Dec. 780.

PARTNERSHIP — BOND EXECUTED BY ONE PARTNER. — A partner executing a bond purporting to bind the firm, but signing his name only thereto, binds himself, but not his partners: *Williams v. Hodgson*, 2 Har. & J. 474; 3 Am. Dec. 563.

SHULTZ v. WALL.

[124 PENNSYLVANIA STATE, 232.]

INNKEEPER IS BOUND TO PAY FOR GOODS STOLEN IN HIS HOUSE FROM A GUEST, unless stolen by the servant or companion of the guest; and however vigilant the landlord may have been, he is responsible to the party losing the property.

CONDUCT OF GUEST CONTRIBUTING TO HIS LOSS IS ALWAYS DEFENSE. — The conduct of a guest of an inn, whether voluntary or negligent, contributing to his loss, is always a defense in an action against the innkeeper to recover for property lost or stolen in the inn; and the guest's failure to deposit valuables in a safe place provided for the purpose by the landlord, after being notified so to do, and his neglect to make use of sufficient fastenings provided for the security of the room from which they are stolen, constitute evidence of contributory negligence on his part.

NOTICE THAT PLACE FOR DEPOSIT OF VALUABLES IN HOTEL HAS BEEN PROVIDED. — The provisions of the Pennsylvania act in regard to the places where notices that a place of deposit for valuables of guests in hotels has been provided shall be posted may be said to be mandatory in the sense that, as they amount to constructive notice, they must be strictly complied with, if constructive notice is relied on; but if notice in fact be proved, then these provisions become immaterial.

JURORS ARE NOT BOUND TO BELIEVE AN INCREDIBLE STORY, even though no witness contradicts it; and where the circumstances surrounding a theft from the room of a guest in a hotel indicate that it could not have occurred if he had fastened the door, the question of contributory negligence should be submitted to the jury, notwithstanding his testimony that he did fasten the door is uncontradicted.

TRESPASS to recover a sum of money alleged to have been stolen from the plaintiff while a guest in the defendant's hotel. The facts are stated in the opinion.

J. N. Wynn, Archibald M. Holding, and R. E. Monaghan, for the appellant.

H. H. Gilkyson, for the appellee.

MITCHELL, J. As long ago as Chancellor Kent's day, it was said: "The responsibility of an innkeeper for the horse or

goods of his guest . . . has been a point of much discussion in the books": 2 Kent's Com. 592. The common-law rule, as established in *Calye's Case*, 8 Rep. 63, was, that the innkeeper was bound absolutely to keep safe the goods of his guest, deposited within the inn; and Kent, after considering the cases, lays it down that "an innkeeper, like a common carrier, is an insurer of the goods of his guest": 2 Kent's Com. 594. The subject is also learnedly discussed in the note to *Calye's Case*, 1 Smith's Lead. Cas. 197, and the notes to *Coggs v. Bernard*, 1 Smith's Lead. Cas. 307, where the learned American annotators sum up the rule in the following form: "An innkeeper is answerable for all losses happening to the goods of travelers becoming his guests, except such losses as are caused by the act of God or the public enemies, or by the conduct of the guest himself, or his servant, or the companion whom he brings with him."

The learned counsel for the appellant has presented us a strong array of authorities to show that the true foundation of the rule as administered in the later cases, both in England and many of our sister states, is the negligence of the innkeeper, and the only difference between the innkeeper and ordinary bailees is, that a loss is *prima facie* proof of the innkeeper's negligence, and throws upon him the burden of disproving it. If the question were open, it might be interesting to examine how far the desire to fix the exact limits of the liability, by resting it on something more definite than public policy, has led to modification of the severity of the common-law rule. Conceding negligence to be the foundation, we must logically concede the desired result, that if the innkeeper shows by satisfactory proof that he took due care, he is absolved from liability. For my own part, I apprehend that the liability, like that of a common carrier, rested on the surrender of the owner's possession and control of his goods, and public policy, which, for the protection of the owner, under such circumstances, precluded every excuse for not restoring the goods to the owner, except such as were the result of *vis major*, the act of God, or the public enemies, which would be notorious, and could not be fraudulently pretended.

But the rule, whatever its foundation, is no longer open to question in this state. In *Houser v. Tully*, 62 Pa. St. 92, 1 Am. Rep. 390, the common-law liability was laid down by Williams, J., in the following emphatic terms: "His responsibility extends to all his servants and domestics, and to all the

goods and moneys of his guest which are placed within the inn; and he is bound, in every event, to pay for them if stolen, unless they were stolen by a servant or companion of the guest." The learned counsel for appellant has distinguished this case very carefully and accurately upon the facts, and claims that the enunciation of the general rule above quoted was not really necessary to the decision of the case actually before the court, and that it is therefore only *dictum*. If the case stood alone, there would be good ground for the claim, and we might be required now to re-examine the foundation and merits of the rule announced. But in *Walsh v. Porterfield*, 87 Pa. St. 376, the former case was distinctly affirmed in all the breadth of the opinion. The judge below had charged the jury that "at common law a hotel-keeper or inn-keeper was liable, at all events, for the goods and baggage of his guests. . . . That law is the same to-day. . . . It was in fact insuring, as it were, the safety of the property of guests; and it was immaterial, if a loss occurred or property was stolen whilst the guest was in the hotel, by whom it was stolen, unless it was by the guest's own servant, or a fellow-guest of the party who was robbed, or the negligence of the guest; and however vigilant the landlord might have been, he was responsible to the party losing the property. That was the common-law liability. He was practically an insurer of the safety of the property whilst the guest remained in his house." It was assigned for error that this charge was too broad, and eminent counsel argued there, as here, that the real foundation of the rule is the negligence of the landlord or his servants. But this court, in affirming the judgment, said: "We adhere to the statement of the law as laid down by our late brother Williams in *Houser v. Tully*, 62 Pa. St. 92, 1 Am. Rep. 390, as to the extent and character of the liability of innkeepers for the goods of their guests. An innkeeper is bound to pay for goods stolen in his house from a guest, unless stolen by the servant or companion of the guest. . . . The learned judge below, in his charge to the jury, evidently adopted this case as his chart, and there is no error in his instructions upon the law." After this deliberate affirmance of the common-law rule, in a case where it was applied, and the correctness of the instruction distinctly assigned for error, we must regard the rule as settled.

The learned judge, therefore, was right in the general instruction he gave the jury as to the foundation of the plaintiff's

case. In the press of the trial, however, the defense, unfortunately, did not receive the same consideration. Neither the question of contributory negligence, nor the effect of the statute of 1855, was presented to the jury as it should have been.

Volenti non fit injuria, and conduct of the plaintiff contributing to the loss, whether voluntary or negligent, is always a defense. This principle, though not very clearly enunciated, was applied to the liability of an innkeeper, even in *Calye's Case*, 1 Smith's Lead. Cas. 197, where the first resolution was, that if the horse was put to pasture at the guest's request, and stolen, the innkeeper was not liable; and the eighth (8 Rep. 63), that if the innkeeper requires his guest to put his goods in such a chamber under lock, and the guest leave them in an outer court, and they are stolen, the innkeeper shall not be liable. And however it might have been in the days of good Queen Bess, when *Calye's Case*, 1 Smith's Lead. Cas. 197, was decided, and when the length of his wine bill might have been deemed sufficient consideration for the duty of an innkeeper to take care of his guest, drunk or sober, it is now held in our own case of *Walsh v. Porterfield*, 87 Pa. St. 376, that intoxication is no excuse for the negligence of a guest which contributes to his loss.

The evidence in the present case leaves the circumstances of the robbery in some degree of mystery. According to the plaintiff's story, he locked and bolted his chamber door on going to bed, and found it open on waking in the morning. The back outer door of the hotel bore marks of violence with a hammer or other tool; the catch of the dead-latch was broken off, and matches of a kind not used in the hotel were found scattered at various points. All this pointed to a burglary by outside parties. Yet the evidence is, that the plaintiff's bedroom door bore no marks of violence anywhere; the key was in the lock, and the transom window was but a foot high, and swung in the middle, leaving only a space of six inches, through which no person could possibly climb. How, then, did the thief get in? There is no theory which does not encounter some difficulties, and the first question that arises in the mind is, whether plaintiff may not be mistaken in supposing he locked and bolted his door. The testimony is, that though a sober man, he was not a total abstainer, and had been drinking that evening. Did he get more than he thought, and is his recollection thereby beclouded? Or did he lock and bolt the door, as he thinks, and did the beer get him up

again in a confused condition of mind, and was his open door the result of this? The other circumstances only add to the difficulty of a satisfactory explanation. The evidence in general, as already said, points to a robbery by outside parties. But the vest carefully folded, and laid between the two lap-blankets on the hat-rack in the dining-room, is hard to reconcile with such a theory. Again, the evidence of Mrs. Wall as to the voices on the porch, and of Rahn as to the men asking for plaintiff, suggest the possibility of other parties in company with plaintiff, and the loss of the money before he entered his room. As already said, there is no view of the evidence that does not meet with some difficulty, and such difficulty is always for the jury to solve. Jurors are to exercise the same common sense and judgment in the jury-box that they do as men in the affairs of life, only with a strict regard, under the direction of the court, to the nature, relevancy, and weight of evidence upon both sides. They cannot base verdicts on surmise or conjecture without evidence, but they are not bound to believe an incredible story because no witness contradicts it. It is for them to survey the whole case, and say whether the party having the burden of proof has met it by a satisfactory preponderance of evidence. The learned judge below was of opinion that there was no sufficient evidence of plaintiff's negligence to be considered by the jury; and therefore, though stating the law correctly as to such negligence, he limited the jury to the consideration of the single question whether or not there was a theft. In this view we are unable to concur. The difficulties in the way of the plaintiff's theory, and the general uncertainty of the entire occurrence, should have sent the whole case to the jury with an affirmance of defendant's second and third points.

The evidence in regard to the safe, and the notice to guests, is not as full or satisfactory as it might be, but it was sufficient to go to the jury. The provisions of the act of May 7, 1855, P. L. 479, in regard to the places where notices must be posted, are intended to secure knowledge brought home to the guest. They may be said to be mandatory in the sense that, as they amount to constructive notice, they must be strictly complied with, if constructive notice is relied on; but if notice in fact is proved, then the provisions for constructive notice become immaterial. Defendant testified positively to having called the plaintiff's attention to the notice at the head of the hotel register, though it was probably not on this particular

visit. The plaintiff denied it. This question should have gone to the jury, for them to determine, under all the circumstances, the lapse of time since plaintiff saw the notice, if they find that he did have his attention called to it, the frequency of his visits, and his consequent familiarity with the customs of the house, etc., whether he should be treated as having notice of the existence of a safe, and if so, whether his omission to avail himself of that protection, and his carrying such an amount of money to his bedroom, was negligence for which he must himself bear the loss.

Judgment reversed, and *venire de novo* awarded.

INNKEEPERS — LIABILITY FOR STOLEN GOODS OF GUESTS. — The law imposes upon an innkeeper the extraordinary liability of protecting the goods of his guests against all losses, except such as are occasioned by the act of God, the public enemy, the misconduct of the guest himself, or of a friend he brings with him: *O'Brien v. Vail*, 22 Fla. 627; 1 Am. St. Rep. 219, and note. It is not negligence for the guest to retain \$495 on his person while sleeping in a hotel room, even though the bolt could be opened by a wire from the outside: *Smith v. Wilson*, 36 Minn. 334; 1 Am. St. Rep. 669. Compare note to *Cutler v. Bonney*, 18 Am. Rep. 130-136; note to *Pettigrew v. Barnum*, 69 Am. Dec. 221-226, as to the liability of an innkeeper to his guest for loss of the latter's property. The innkeeper must answer for his guest's goods stolen from the inn: *Clute v. Wiggins*, 14 Johns. 175; 7 Am. Dec. 448, and note.

INNKEEPERS — CONTRIBUTORY NEGLIGENCE OF GUEST. — As to when and under what circumstances the contributory negligence of a guest will prevent his recovery against the innkeeper, see note to *Dunbar v. Day*, 41 Am. Rep. 777, 778.

SCHROEDER v. GALLAND.

[134 PENNSYLVANIA STATE, 277.]

MECHANIC'S LIEN, SUBCONTRACTOR CANNOT FILE, WHEN. — Where the principal contractor for the erection of a building stipulates in his contract that he will, upon its completion, deliver the building to the owner, free from all liens and encumbrances, a subcontractor cannot file a lien against the building for work done or materials furnished by him in its erection. The subcontractor is charged with knowledge of all the terms and stipulations of the contract between the owner and the principal contractor, and is bound by them.

SCIRE FACIAS upon a mechanic's lien. There was a verdict and judgment for the plaintiff, and the defendants appealed. Other facts are stated in the opinion.

S. B. Price and Lemuel Amerman, for the appellants.

Everett Warren and Edward N. Willard, for the appellee.

GREEN, J. The plaintiff, Schroeder, was a subcontractor under the principal contractor, Olmsted, for the execution of a part of the work of the construction of a house for the defendant Galland. In the contract between the owner and the principal contractor, it was expressly stipulated that the building should be built, finished, and delivered over to the owner "free of all liens and encumbrances, or any claims whatever, that might arise under any action of the party of the second part, or his legal representatives, under this contract." And again, it is provided that the payments were to be made to the party of the second part, "provided the wages of all artisans and laborers, and all those employed by or furnishing materials to the said party of the second part, on account of this contract, shall have been paid and satisfied"; and further, "in case the party of the second part fails to pay and satisfy all and every legal claim and demand, as aforesaid, against the building, the said party of the first part may, if he deems proper so to do, retain from the moneys due, if any, to the party of the second part, enough to satisfy such claims and demands, and if there be not enough due or coming, then the said second party covenants and agrees to pay the same. Said second party also agrees to pay subcontractors, and parties furnishing materials on account of this contract, *pro rata*, at each estimate." The owner seems to have guarded himself as well as it was possible to do, by these provisions, against liens, claims, demands, and liabilities of and to any and all other persons than the principal contractor. The stipulation against liens is undoubtedly obligatory upon the principal contractor, and so far as he is concerned, no lien could be filed: *Long v. Caffrey*, 93 Pa. St. 526; *Scheid v. Rapp*, 121 Pa. St. 593.

The controlling question of this case is, Can the subcontractor file a lien for the work and materials done and furnished by him, notwithstanding the stipulations of the principal contract? If he can, the owner, instead of paying nine thousand dollars for the completed house, according to the contract, will be obliged to pay therefor nearly eleven thousand dollars.

The plaintiff filed his lien as a subcontractor under Olmsted, whom he described as contractor, and with whom he contracted. He says in his claim of lien: "The name of the person with whom Conrad Schroeder contracted is named Charles Olmsted." He also states that the name of the owner

is Anna M. Galland, the wife of B. Galland. He therefore knew that he was dealing and contracting, not with the owner, but with one who was a contractor for the construction of the building. The only connection between the owner and this subcontractor was through and by means of the written contract between the owner and the principal contractor. He could not, in such circumstances, contract with this person without being charged with notice of the contract of the latter with the owner, and, by necessary consequence, with notice of all its terms and stipulations.

A subcontractor for construction is certainly bound to know the kind of building that is to be erected, the materials of which it is to be built, the price to be paid for it, and the manner and times of payment. He cannot, under a contract for the erection of a building at a cost of one thousand dollars, furnish work and materials to the amount of five thousand dollars. He cannot furnish wood as material for the erection of a building to be built of marble or stone or bricks. Nor can he furnish unsuitable materials, even of a kind demanded by the contract, and entitle himself to a lien therefor.

In the case of *Hurlan v. Rand*, 27 Pa. St. 511, we decided that to entitle a material-man who deals with the contractor to have his lien, he must furnish materials suitable for the building, and apparently adapted to it. There the contractor made a contract with a subcontractor to furnish a heater, of a new construction, to heat the building. The subcontractor employed the plaintiff, who claimed a lien, to do the work. The contract with the subcontractor stipulated that if the heater did not answer the purpose of heating the building, it was to be removed at his expense. The claimant, who did the work, filed a lien for it, and this court held he was bound by the provisions of the contract with his employer, the subcontractor, though he was no party to it, and rejected his lien. Lowrie, J., in delivering the opinion, said: "There are several cases that show that the material-man cannot justly charge the building for all the materials that he may choose to furnish on its credit, without reference to the quantity or quality needed. He must, in his supplies, regard the size and apparent character of the building, and his lien cannot go beyond what these show to be reasonable: *Odd Fellows' Hall v. Masser*, 24 Pa. St. 510; 64 Am. Dec. 675. . . . And no one would think of saying that a material-man shall have a lien for materials furnished for a particular purpose, and which are

unfit for it. . . . If they are furnished on the order of the owner of the house, of course this rule does not apply; for a man may pledge his own property for any kind of materials. But it is involved in the very fact of furnishing them to a contractor of the building, on its credit, that he should know its character, and that they must, at least apparently, be adapted to it." On another branch of the case, the same judge said: "When the owner employs a house-builder to erect a house for him, the parties are directly connected by contract, and the lien must be founded on it." The same thought is expressed and enforced in the recent case of *Brown v. Cowan*, 110 Pa. St. 588. We there say: "It is the plain and obvious duty of one who deals with an alleged contractor to know the relation which he bears to the owner. Failing in this, he furnishes labor or materials at his peril."

Of course, it cannot be questioned for a moment that a subcontractor who undertakes the construction, in whole or in part, of a building, under a contract with the principal contractor, is absolutely bound by all the plans and specifications expressed in the original contract of the owner with the builder. He must conform to the original contract in all matters, and in the minutest detail, precisely as the builder would be obliged to do. It is most obvious that he cannot depart in any respect, either from the designs, the dimensions, the materials, the plans, shapes, and sizes, that are expressed in the original contract; and the reason is most manifest. He is the representative of the builder. He undertakes to perform the contract of the latter with the owner, either in whole or in part, and of course he must conform to that contract in every particular. It would be of no use for him to say that he did not know the particulars of that contract; he is bound to know them; it is a legal necessity arising from the fact that he has undertaken to do the work which his principal has engaged to do. He certainly cannot furnish pine wood for interior woodwork, when the owner's contract with the builder calls for walnut or cherry or ash. He cannot furnish stone when the contract requires marble, or bricks when stone is designated, or one kind of stone when another kind is expressed, or wood instead of bricks. He cannot furnish a building of two stories, when three are demanded by the contract, or of six rooms when ten are required. These conclusions are readily appreciated, and will be at once conceded. But to go further and into greater detail, it must be equally plain that one who,

as a subcontractor, agrees with the principal contractor to furnish materials only for the building is just as precisely bound as his principal by the stipulations of the original contract. If that contract requires the mantels to be of marble, he must make them of marble, and he not only could not acquire a right to a lien if he made them of slate or of wood, but he would not be entitled to any payment whatever from the owner for his work. And *vice versa*, if they were required to be of wood, he could not make them of marble or of slate. And so, if a carpenter should take a subcontract for the woodwork, he could not furnish hemlock flooring when the owner's contract required pine or ash, or doors made of pine when doors of walnut were specified. And so of painters and glaziers and plasterers who take subcontracts for the execution of their several specialties; they are all bound by the owner's contract with the builder, precisely as the builder himself is bound. They cannot be permitted to be ignorant of his limitations, or to plead such ignorance as an excuse for insufficient performance. And the reason for it all is most manifest. They are bound to do just what their principal was bound to do, because they assumed to perform his contract with the owner to the extent of their undertaking, and of course they must perform according to his express limitations. In other words, they necessarily have notice of the terms and stipulations of his contract with the owner, and that means, not a part, but all of those terms and stipulations. Upon the plainest legal principles applicable in all other cases, they cannot have the benefits of the builder's contract without accepting the conditions upon which those benefits are conferred. If they could, they would defeat the explicit contract of the owner upon a point without which, it may easily be, he would never have consented to it. If the law would tolerate this method of dealing with building contracts, it would only be necessary for the original contractor to sublet his contract by portions, to different persons, and the prohibition against liens would be utterly destroyed, and a contract would be enforced against the owner to which he never consented.

There is no hardship to subcontractors in enforcing a provision prohibiting liens against them, because they are bound to know, by necessity, all the terms of the contract made by their principal in any event, and they therefore know of the prohibition. But the owner has no opportunity of protecting himself, because he cannot know to what persons the contract,

or portions of it, may be sublet. He has done all he could do by prohibiting liens, in plain terms, in his written contract; and of that prohibition all subcontractors are bound to know, and may abstain from contracting on such terms if they choose. We know of no good reason for giving such an extraordinary privilege to subcontractors as the right to repudiate one of the most important terms to which their contracts are subject, or of taking away from an owner the right to insist upon the performance of his contract according to its literal terms. We take away houses and lands from their owners by means of some secret lien or trust of which they know nothing, by applying the doctrine of constructive notice; and it would be passing strange for us to hold that the right of a subcontractor for part of a building is of so sacred a character that it shall not be bound by the express limitations of a written contract, under which and by force of which his own contract must be performed. His right of lien has no existence at common law or in equity. It is a creature of statute alone; but the statute confers upon him no special prerogative to transcend the most familiar principles of the law, and to claim privileges which are denied to all other citizens in the determination of their contract rights. Let it be granted that a contractor, as well as the owner, has power to bind the building by a lien for work and materials; we have never yet held that he may confer that right upon a mere subcontractor under him when, by the terms of his own contract, he does not possess the right himself. The question is one of first impression. Heretofore it has never been before us. It is with us now, and we are at liberty to decide it in accordance with our views of right and justice, and with those principles of the interpretation and administration of contracts between citizens which we unfailingly apply in all other cases.

In an old case, decided many years ago by the district court of Allegheny County (*Campbell v. Scaife*, 1 Phila. 187), the same conclusion we have reached was expressed and applied. The decision is of no binding authority upon this court, but the reasoning of the opinion is of such clearness and force that some of it may well be repeated here. The learned court says: "The owner contracts with the builder to erect a house on certain terms, and the builder makes a subcontract with a material-man to supply the materials. The claim of relationship consists of but two links, the second of which hangs by the first, and will bear no greater weight. The subcontractor

comes in by reason of his direct contract relation to the builder, and the right of lien of the former for his claim is, *pro tanto*, substitutionary to that of the latter. As against the owner the terms of the original contract, and as against the builder the terms of the subcontract, limit and qualify the lien of the subcontractor, so as to prevent his claim from abating the terms of either contract. . . . The allowance of any lien at all to a subcontractor is a special privilege, granted only in case of buildings; and it is not unreasonable to require him to look to the principal contract to ascertain whether it is such as to justify him in becoming a contractor under it. The argument that the law and the principal contract make the builder the agent of the owner proves nothing. Suppose the fact to be so, still his agency is only special, limited by the terms of the contract. He is to employ men to build the house in the manner and on the terms there indicated. For anything beyond that, he exceeds his authority, and does not bind his principal." In the case of *Dickinson College v. Church*, 1 Watts & S. 462, Mr. Justice Rogers, in delivering the opinion of this court, said: "It is a great mistake, which cannot be too soon corrected, if any suppose that when a person undertakes to furnish lumber to a contractor, on the credit of a building, that he is relieved from inquiring into the nature of the building he trusts, whether it is brick or frame, whether it is a one or three story house, or whether it is large or small; that, in short, he can furnish materials enough to complete a three-story house of the largest dimensions, when the materials are intended for a house of the most inferior description. The very fact that he credits the building, and does not depend altogether on the personal responsibility of the contractor, should, it would seem, immediately suggest the propriety of making the necessary inquiries as to the size, materials, and nature of the intended erection." In the state of California it has been held by their court of last resort, in two cases, that the right of the subcontractor to a lien is controlled by the terms of the original contract, and he is presumed to have notice of the terms of that contract: *Shaver v. Murdock*, 36 Cal. 298; *Henley v. Wadsworth*, 38 Cal. 356. Entertaining these views, we sustain the third, fourth, fifth, and sixth assignments of error.

Judgment reversed.

AS TO WHETHER STIPULATIONS IN A CONTRACT BETWEEN A BUILDER AND THE OWNER can destroy a subcontractor's right to a mechanic's lien, see *Benedict v. Hood*, 134 Pa. St. 289, *post*, p. 698, and particularly note.

BENEDICT v. HOOD.

[184 PENNSYLVANIA STATE, 283.]

SUBCONTRACTOR CANNOT FILE MECHANIC'S LIEN AGAINST BUILDING, where the principal contractor has, in his contract with the owner, stipulated not to permit any liens to be filed against the building; and the fact that subsequent alterations in the plan of the building were made by the owner and builder is of no consequence as to the question of the right of the subcontractor to file a lien.

EXECUTION OF BOND, WHAT IS A SUFFICIENT. — Where a subcontractor, joining in a bond to the owner of a building for the faithful performance, by the principal contractor, of the covenants and agreements of the original contract, does not sign his name at the foot of the bond, but writes his name in the blank at the head of the bond, left for the names of the obligors, this is a good execution of the bond as to him; and the fact of his joining in the bond is proof conclusive that he had notice of the contents of the principal contract, and agreed to the performance of all its terms.

SCIRE FACIAS upon a mechanic's lien. In his contract with the owner, the principal contractor agreed that he would not at any time suffer or permit any lien to be put or remain upon the building to be erected. There was a verdict and judgment for the plaintiff, and the defendant appealed. Other facts are stated in the opinion.

Francis I. Gowen, for the appellant.

Frank L. Lyle and Abraham M. Beidler, for the appellee.

GREEN, J. We have just decided, in the case of *Schroeder v. Galland*, 134 Pa. St. 277, *ante*, p. 691, that a stipulation that no liens shall be filed, in a contract between the owner and builder, is obligatory upon subcontractors, and deprives them of the right to file a lien against the building. That decision is applicable to the present case, and controls it. There is here the added circumstance that the subcontractor joined in a bond with other subcontractors to the owner, conditioned for the faithful performance, by the principal contractor, of all the covenants and agreements of the original contract. One of those covenants was, that the principal contractor would not suffer or permit any lien to be filed against the building. The plaintiff, who was a subcontractor, did not sign his name at the foot of the bond, but he wrote his name in the blank left at the head of the bond for the names of the obligors, and this was a good execution as to him. The fact that subsequent alterations in the plan of the building were made by the owner and builder is of no consequence as to the

question of the right of the plaintiff to file a lien. The fact of his joining in the bond was proof conclusive that he had notice of the contents of the principal contract, and agreed to the performance of all its terms. As one of these terms provided that no lien should be filed, he became subject to that condition, and he must be held to have waived his right to any lien. But apart from that consideration, the opinion in *Schroeder v. Galland*, 134 Pa. St. 277, *ante*, p. 691, decides that he had no right of lien in any event, because the original contractor had none, by the terms of his contract.

Judgment reversed.

CAN STIPULATIONS IN CONTRACT BETWEEN BUILDER AND OWNER DESTROY RIGHT OF SUBCONTRACTORS AND MATERIAL-MEN TO MECHANIC'S LIEN?—The only case prior to *Schroeder v. Galland*, 134 Pa. St. 277, *ante*, p. 691, referred to and followed in the principal case, that we have been able to find in which it has been decided that a subcontractor is precluded from filing a mechanic's lien by a stipulation in the contract between the original contractor and the owner that the contractor will not encumber or permit to be encumbered the building to be erected by any mechanics' liens is *Bowen v. Aubrey*, 22 Cal. 566. This case was decided in 1863, under the California mechanic's lien law of April 19, 1856, as amended by the act of April 22, 1858. It has been cited in several subsequent cases in California, on other points, but not upon the question under consideration. The decision in that case seems to have been overruled in the later case of *Whittier v. Wilbur*, 48 Cal. 175. In that case, McKinstry, J., in delivering the opinion of the court, said: "The contractor and owner cannot deprive the material-man of his lien by introducing a stipulation into the building contract by which the contractor agrees to indemnify the owner against any lien by persons furnishing materials to be used in the construction of the building." The form of the stipulation in the contract in that case was as follows: "And the parties of the second part hereby agree to save, keep harmless, and indemnify the party of the first part, and the said building, and also the said land, and the owner or owners thereof, of and from any liens, claims, or notices of liens, by persons performing labor upon or furnishing materials to be used in the construction of the said building, and from all costs, expenses, counsel fees, damage, and injury arising, or that may arise, from the assertion of any such liens, claims, or notices of liens."

In *Cattanach v. Ingersoll*, 1 Phila. 285, it was decided that an agreement of the contractor with the owner, not to make the building liable to liens of others, will not prevent liens from arising in favor of material-men. See also 1 Trickett on the Law of Liens in Pennsylvania, 29. Stroud, J., who delivered the opinion of the court in that case, held that the contract between the contractor and the owner is *res inter alios acta*, and cannot be regarded as an estoppel when the lien, which is a statutable incident with which the contractor, as such, has no concern, is sought to be enforced.

In *Mubrey v. Barrow*, 11 Allen, 152, it was decided that a lien may be enforced for labor performed and materials furnished in the erection of a house under the employment of one who has agreed with the owner of the land to erect a house thereon, and to pay and discharge all claims for labor and

materials furnished and used in the erection thereof, so that there shall be no liens upon the premises.

In the case of *Hartman v. Berry*, 58 Mo. 487, A advanced money to B to enable the latter to improve certain land, taking a bond from the contractor, with D as surety, that the buildings to be erected would be delivered to B free from mechanics' liens. E afterwards purchased the property, and took an assignment of the bond. D filed a lien for materials furnished to the contractor, and it was held that he was not estopped by the bond from filing his lien. Adams, J., who delivered the opinion of the court, said: "The bond itself would not operate as a bar or estoppel against filing liens."

In *McLaughlin v. Reinhart*, 54 Md. 71, although the contractor had agreed to release from mechanics' liens thirty-eight houses which he had contracted to build, as soon as they were respectively completed, it was held that he did not lose his right to file a lien for work he had done on some of the houses, after the contract had been abandoned by consent of the owner.

In *Clough v. McDonald*, 18 Kan. 114, it was decided that a subcontractor is not bound by any of the terms and conditions relating to the payment of money contained in the original contract, except by such only as prescribe the amount that is to be paid. We think the doctrine of the principal case is not sustained by the weight of authority, nor do we think it is sustainable in reason.

WEILLER v. PENNSYLVANIA RAILROAD COMPANY.

[124 PENNSYLVANIA STATE, 310.]

COMMON CARRIER CANNOT RELIEVE HIMSELF FROM LIABILITY FOR ACTUAL VALUE OF GOODS LOST THROUGH HIS NEGLIGENCE by a stipulation in a bill of lading, that "when a valuation as agreed upon shall be named upon this shipping receipt, it is distinctly understood that such valuation shall cover loss or damages from any cause whatever."

TRESPASS to recover from the defendant the value of certain whisky alleged to have been delivered to the defendant for transportation, and to have been totally lost and destroyed in transit by reason of the negligence and carelessness of the defendant. The jury, under the instructions of the court, found for the plaintiff for the full value of the whisky less the freight. Other facts are stated in the opinion.

George Tucker Bispham, for the appellant.

Edward H. Weil, for the appellee.

GREEN, J. In the case of *Elkins v. Transportation Co.*, 81½ Pa. St. 315, no question of negligence, or of the carrier's right to limit his liability for his acts of negligence, was raised, discussed, or decided, either in the court below or in this court. The reporter says the cause of action set out in the declaration

was the loss of certain high wines delivered to defendant, but lost by negligence. This is the only reference to the subject of negligence to be found in the entire report of the case. The record shows that the case was not tried upon any theory of negligence, but exclusively upon the terms and interpretation of the contract as contained in the bill of lading. No question was made upon the subject of the right of the carrier to limit his liability for loss occurring by his own negligence, and we are bound to assume that the facts of the case did not give rise to such a question. Nothing was said upon that subject, either in the argument of counsel, or in the charge of the court below, or in the opinion of this court. It was for this reason that no reference was made to this case in the opinion of this court in the case of *Grogan v. Adams Express Co.*, 114 Pa. St. 523; 60 Am. Rep. 360. The same reason is applicable now. It may be that the accident in the Elkins case was not the result of any negligence of the carrier. Judging from the names of the counsel concerned, it is almost certain that if the facts had developed a case of negligence, and the question of the right of the carrier to limit his liability for acts of negligence, that question would have been promptly raised, discussed, and decided.

In the present case, the question does arise under the conditions annexed to the bill of lading. Many enumerated causes of loss are expressly excepted, such as fire, riots, strikes, heating, freezing, leakage, rust, etc., and as to these the right of the company to limit its liability must be affirmed in accordance with numerous decisions of this and other courts. But the final clause of the conditions stipulates that "when a valuation as agreed upon shall be named upon this shipping receipt, it is distinctly understood that such valuation shall cover loss or damage from any cause whatever." As this necessarily includes loss arising from negligence, and as the testimony tended to establish a loss by negligence, the question of the efficacy of the clause under consideration to relieve the company from liability for negligence beyond the agreed value necessarily arises. Upon that subject we have so recently expressed ourselves, in the case of *Grogan v. Adams Express Co.*, 114 Pa. St. 523, 60 Am. Rep. 360, that we think it unnecessary to repeat either the text or substance of the opinion there announced. So far as the question at issue is concerned, we can see no difference between that case and this.

Judgment affirmed.

MITCHELL, J., delivered a dissenting opinion, of which the following is a synopsis: To allow a shipper to value his goods for purposes of freight charges, etc., at one price, and when they are lost, to recover, as in this case, three times his own agreed value, is a direct premium on fraud, such as no court ought to sanction. The public policy which prohibits a common carrier from contracting against the negligence of his employees, or to express it in commercial language, the rule which prohibits a shipper from becoming his own insurer against accidental loss, if he so chooses, by paying a lower rate of freight, was founded upon a condition of things which has passed away, and the rule should be materially modified, if not abrogated altogether, in regard to goods. Such an alteration of the law can, however, be made by the legislature only, and cannot properly be made by the courts. The rule should not be extended in the slightest degree. In this case the public were offered two plans, — a full liability at a regular rate, or a stipulated maximum liability at a reduced rate. The plaintiff, with full knowledge, chose the latter. Upon the reasonableness of such a regulation, Lord Blackburn's argument in *Manchester etc. Ry Co. v. Brown*, L. R. 8 App. Cas. 703, 712, is unanswerable. Because he believed this case was a step beyond the previous decisions on the subject, he was compelled to dissent.

WUNDER v. McLEAN.

[184 PENNSYLVANIA STATE, 334.]

LANDLORD CANNOT ESCAPE LIABILITY FOR EXISTING NUISANCE BY LEASING THE PROPERTY on which it exists to a tenant, and putting him in possession. And where the nuisance complained of consists of the use of a defective cess-pool by the tenant, the latter's liability for such use cannot take the place of or in any manner affect that of the landlord, if the cess-pool was not properly built, or was out of repair when the tenant was put in possession. But if the cess-pool was properly built, and in good repair when the tenant took possession, the landlord will not be liable for the consequences of the tenant's neglect to keep it in repair.

TRESPASS to recover damages for an alleged nuisance affecting the dwelling of the plaintiffs' wife. The opinion states the facts.

Frederick J. Shoyer and John S. McKinlay, for the appellants.

Emanuel J. Page and Patrick F. Dever, for the appellees.

WILLIAMS, J. The fourth assignment of error complains that the learned judge of the court below took the facts wholly from the jury, leaving them nothing to do except to settle the amount of the plaintiffs' damages. Whether this was right or not depends on whether the case presented, when the evidence closed, any open questions of fact for the jury to pass upon.

The defendants owned separate but adjoining houses and

lots, Nos. 139 and 141 Mechanic Street. The house of the plaintiffs is on Leibert Street, and the defendants' lots extend back to and adjoin that of the plaintiffs on one side. The action is brought to recover damages alleged to have arisen from leakage from the cess-pool used in common for the privies on Nos. 139 and 141, into the plaintiffs' cellar. Mrs. Craven, one of the defendants, owned and occupied No. 139. No. 141 was owned by McLean, but was, and for several years had been, occupied by Rooney, as a tenant. The plaintiffs' right to recover depended on whether the leakage existed as alleged, and as to McLean, on whether such leakage was due to improper construction, or defective condition when the lease was made, for which the landlord would be answerable, or to negligent use by the tenant, for which he alone should be held responsible.

By a city ordinance, it is made unlawful to locate a cess-pool within two feet of the wall of an adjoining building. This one is not within the prohibited distance, and its location may be regarded as a lawful one. If it was properly built, and in good repair when the tenants took possession, the landlord ought not to be held responsible for the consequences of his tenant's neglect. On the other hand, if the cess-pool was defectively built, or was out of repair when the tenant was put in possession, the mere fact of the tenant's occupancy when the injury arises will not relieve the landlord from the consequences of his own negligence. He is liable because of the defective construction or condition at and before the tenancy began, and this liability continues, notwithstanding the possession of the tenant. He cannot escape liability for an existing nuisance by leasing the property to a tenant, and putting him in possession: *Knauss v. Brua*, 107 Pa. St. 85. The tenant who should use the defective cess-pool would be liable because of his use, but such liability would not take the place of, or in any manner affect that of, the landlord. This was distinctly ruled in *Fow v. Roberts*, 108 Pa. St. 489. In that case, the plaintiff was nonsuited in the court below, the court being of opinion that the plaintiff's action should have been brought against the tenant who was in possession during the time when the alleged injury was sustained. This court, however, held that inasmuch as the cess-pool was maintained by the landlord within the prohibited distance, in violation of the city ordinance, and the testimony showed that as often as the contents of the pool rose to a level with the bottom of the

plaintiff's cellar, they began to find their way into the cellar, the plaintiff should have been allowed to go to the jury on the question of the landlord's defective construction.

In this case, the question of the character of the original construction, and the actual state of repairs when the premises passed into the possession of the tenant, was one upon which McLean had the right to go to the jury. The learned judge of the court below seems to have overlooked this question, or to have taken its decision into his own hands. This was doubtless an inadvertence, but we do not see how the mistake can be repaired without sending the case back for a new trial.

The judgment is reversed, and a *venire facias de novo* awarded.

LANDLORD AND TENANT — NUISANCE. — Where premises are leased with a nuisance existing upon them at the time, the landlord is liable: Note to *Leonard v. Storer*, 15 Am. Rep. 78, 79. The lessee is liable for a nuisance occasioned by his negligence, having covenanted to keep the premises in good repair and condition: *Clancy v. Byrne*, 56 N. Y. 129; 15 Am. Rep. 391, and note 398-400, where the case of *Gwinnett v. Hamer*, 32 L. T., N. S., 835, is cited in full. In *Inguerssen v. Rankin*, 47 N. J. L. 18, 54 Am. Rep. 109, the landlord was held liable, where a nuisance was created by the lessee under a lease in which he had covenanted to repair the premises, and at the expiration of the lease the landlord renewed the same, with full knowledge of the existence of the nuisance. See also note to *Poluck v. Pioche*, 95 Am. Dec. 123, 124. Ordinarily, the tenant, not the owner, must answer for injuries resulting from a failure to properly care for the leased premises; but where the landlord leases premises with a nuisance thereon, he is liable: *Tomie v. Hampton*, 129 Ill. 379.

PRICE v. CONWAY.

[184 PENNSYLVANIA STATE, 34.]

OFFICE OF INNUENDO IN ACTION FOR LIBEL. — In an action for libel, the office of the innuendo is to define the defamatory meaning which the plaintiff sets upon the words; to show how they come to have that meaning, and how they relate to the plaintiff. If they are capable of the meaning he ascribes to them, it is for the jury to say whether or not they were used in that sense.

SPECIAL DAMAGE NEED NOT BE ALLEGED IN DECLARATION FOR LIBEL WHEN. — Any written words which have a tendency to injure a person in his or her office, profession, calling, or trade are libelous, and in an action therefor it is not necessary for the declaration to contain an averment of special damage.

TRESPASS for libel. The opinion states the case.

Avery D. Harrington, for the appellant.

James H. Shakespeare, for the appellee.

McCOLLUM, J. The defendant having demurred to the declaration, all relevant matters well pleaded therein must be accepted as true: *Wildee v. McKee*, 111 Pa. St. 335; 56 Am. Rep. 271.

The facts of the case, as we gather them from the declaration, are, that the plaintiff, at the time of the committing of the grievances therein mentioned, was the proprietor of the Haven College of Shorthand and Typewriting, located at 1322 Chestnut Street, Philadelphia, and was fully competent and authorized to teach the Haven system of shorthand. The defendant was the principal of a rival school, located at 1223 Chestnut Street. These were the only schools in Philadelphia in which the Haven system of shorthand writing was then taught. The defendant, with full knowledge of these facts, published certain certificates, over the signature of Curtis Haven, author of Haven's shorthand system, in which it was stated that the only authorized Haven college in Philadelphia was at 1223 Chestnut Street, of which the defendant was the principal; that he could recommend her teaching, but not that of another teacher, who was using his name without authority, and for whose teaching he would not be responsible. The defendant also published a circular over her own signature, in which it was stated that there were other teachers of Haven's shorthand in Philadelphia, and that one of them was using the name "Haven College," without authority. The declaration contains *verbatim* copies of these publications, and alleges that they charge, and were intended to charge, that the plaintiff was incompetent to teach the Haven system of shorthand, and that she was using the name "Haven College" without authority, and that by means of these accusations, falsely and maliciously made, she has been greatly prejudiced in her reputation and business, and has sustained great loss therein. It specifically describes the injuries inflicted on her business by the publication recited in it, and lays her damages at five thousand dollars.

It is contended, in support of the demurrer, that the matter set out in the declaration is not libelous, and that the innuendo is not justified by it. Any written words which have a tendency to injure a person in his or her office, profession, calling, or trade are libelous: *Odgers on Libel and Slander*, 19. An innuendo cannot introduce new matter, or enlarge the natural meaning of words, or put upon them a construction they will not bear. Its office is to define the defamatory meaning which

the plaintiff sets upon the words; to show how they come to have that meaning, and how they relate to the plaintiff. If they are capable of the meaning he ascribes to them, it is for the jury to say whether they were used in that sense: *Odgers on Libel and Slander*, 100, and authorities cited; *Bornman v. Boyer*, 3 Binn. 515; 5 Am. Dec. 380; *Thompson v. Lusk*, 2 Watts, 17; 26 Am. Dec. 91; *Commonwealth v. Keenan*, 67 Pa. St. 203.

As at the time of the grievances mentioned in the declaration there were but two schools in Philadelphia in which the Haven system of shorthand was taught, it is clear that the publications referred to the plaintiff, and we think that they justify the innuendo which defines the meaning she ascribes to them. The declaration contains an averment of special damage, although, in libel, or where words are spoken of another, in the way of his or her profession or trade, it is not necessary: *Odgers on Libel and Slander*, 225.

Judgment reversed, and *procedendo* awarded.

LIBEL — INNUENDO. — The office of the innuendo is to aver the meaning of the language published: *Hayes v. Press Co.*, 127 Pa. St. 642; 14 Am. St. Rep. 874, and note.

LIBEL — ACTIONABLE WORDS. — Published words are actionable which directly tend to the prejudice or injury of one in his office, profession, trade, or business, and which, if true, would render him unworthy of employment: *Williams v. Davenport*, 42 Minn. 393; 18 Am. St. Rep. 519, and note; and no special damages need be alleged in the complaint if the words are actionable *per se*: *Newman v. Stein*, 75 Mich. 402; 13 Am. St. Rep. 447; *Montgomery v. Knox*, 23 Fla. 595.

MARTINDALE v. WILSON-CASS COMPANY.

[134 PENNSYLVANIA STATE, 248.]

DIRECTORS OF CORPORATION ARE NOT ENTITLED TO ANY COMPENSATION FOR OFFICIAL SERVICES rendered by them as directors, unless compensation is provided for by the charter or by-laws of the corporation. If, therefore, the charter or by-laws of a private corporation contains no such provision, a director or president of such corporation cannot recover for official services rendered in and about its business, when no agreement for compensation preceded them. No presumption of such an agreement arises from the performance of the services.

AGREEMENT TO PAY FOR OFFICIAL SERVICES OF OFFICER OF CORPORATION, MADE AFTER PERFORMANCE of the services, will not sustain an action against the corporation to recover therefor.

ASSUMPSIT. The opinion states the case.

Silas W. Pettit and John R. Read, for the appellant.

Wendell P. Bowman, for the appellee.

McCOLLUM, J. The plaintiff claims that in May, 1888, in consideration that he had rendered services for the defendant in and about its business, at its special instance and request, it agreed to pay him one thousand dollars on demand. The defendant is a corporation, and the plaintiff was at one time a director and the president of it. The affidavits of defense allege that the plaintiff was duly elected president of the defendant corporation on April 21, 1888, and that his salary was then fixed at eighteen hundred dollars per annum; that on the 14th of May following he resigned the office of president, and that during his incumbency of it he attended but three meetings of the company; that the only services rendered by him to the company, for which any compensation was agreed at any time to be paid, were as president, during the twenty-four days he held that office.

The general rule on the subject of compensation to directors of a corporation is thus stated in 1 Morawetz on Corporations, 2d ed., sec. 508: "Directors are not entitled to any compensation for their official services as directors, unless compensation is provided for by the charter, or the by-laws adopted by the majority." The decisions in *Kilpatrick v. Penrose F. Bridge Co.*, 49 Pa. St. 118, 88 Am. Dec. 497, and *Loan Ass'n v. Stonemetz*, 29 Pa. St. 534, recognize and enforce this rule. In *Carr v. Chartiers Coal Co.*, 25 Pa. St. 337, it was held that the secretary of a private corporation, at a fixed salary, could not recover extra pay for services in that capacity, although the services were not anticipated at the time of his appointment, and were not enumerated in the charter or by-laws.

The official services of a director or president of a private corporation are rendered in and about its business, and at its request, but he cannot recover pay for such services unless an agreement for compensation preceded them. No presumption of such agreement arises from the services; it must be proven.

The plaintiff's statement in this case fails to inform us what the services were for which he claims pay, or to allege that they were rendered on a promise of the corporation to pay for them. He relies on an agreement made after the services were performed; and this alone will not support the action, if the services for which he sues were rendered in his capacity as director or president. It may be that for services as president, he can recover on the basis of the salary attached to that office; but a salary of eighteen hundred dollars per annum

would not yield one thousand dollars for twenty-four days of service. The statement of the plaintiff's claim, and the affidavits of defense which answer it, taken together, show that the services for which he seeks to recover in this action were performed in his capacity as director or president of the defendant company. It follows from what has been said that it was error to enter judgment for want of a sufficient affidavit of defense.

Whether a director or president of a private corporation who is properly employed to perform services which do not pertain to his office is entitled to such compensation as has been agreed upon, or as the services are reasonably worth, is a question on which we express no opinion, as it is not raised by this record.

Judgment reversed, and *procedendo* awarded.

CORPORATIONS—COMPENSATION OF OFFICERS.—Officers of a corporation are not entitled to any compensation for their services unless it has been fixed by a by-law or resolution before the services were performed: *Holder v. Lafayette etc. R. R. Co.*, 71 Ill. 106; 22 Am. Rep. 89; compare *Ten Eyck v. Pontiac etc. R. R. Co.*, 74 Mich. 226; 16 Am. St. Rep. 633, and note.

McCLUNG v. DEARBORNE.

[124 PENNSYLVANIA STATE, 305.]

MASTER IS CIVILLY LIABLE FOR TRESPASS OF HIS SERVANT WHEN.—A master is not liable for the independent trespass of his servant, not done in the course of the service. But the master is civilly liable for the manner in which his servant does the work he is employed to do, although the manner in which he does it is contrary to the instructions given him by his master. It is the character of the employment, and not the private instructions given by the master to his servant, that must determine his liability. Where, therefore, a master, claiming to own an organ in the possession of another, sends his servants to the latter's house to remove the organ therefrom, and the servants enter and take the organ by force and violence, the master will be liable for their trespass, although in committing it they violated his express instructions.

TRESPASS. The opinion states the case.

Peter Boyd, for the appellant.

Frederick J. Shoyer and John S. McKinlay, for the appellee.

WILLIAMS, J. Dearborne is a dealer in cabinet organs and other musical instruments. It is his habit, and it seems to prevail quite generally among dealers in similar articles, to

sell on the installment plan to those who desire it, taking an instrument in the nature of a lease from the purchaser. The several installments of purchase-money are to be paid as rent. If they are paid, the article becomes the property of the so-called lessee. If not paid, the vendor reserves the right to seize and retain the article.

Fox was an employee of Dearborne, whose business was to hunt up instruments on which one or more installments were unpaid, whether in the hands of the original purchasers or their vendees, in order that they might be seized or replevied by Dearborne. He had sought and obtained admission to the house of McClung by means of falsehood, and secured the number and description of the cabinet organ in the parlor. His employer alleged that it was an instrument which he had sold or leased to a customer two or three years before, and on which unpaid installments were due. Fox expressed confidence in his ability to invade McClung's home a second time, and bring off the organ, without a breach of the peace. An expedition was fitted out, consisting of two men and a team, under the direction and control of Fox, for this purpose. Before they set out, they were instructed by Dearborne not to commit an assault and battery on any person, and not to break the law. They went to McClung's house, secured admission to the parlor by a false pretense, and began the removal of the organ. Mrs. McClung and her son, who happened to be at home, tried to resist, but were at once overpowered, and the organ and its belongings carried off. The scene is described by one of the witnesses thus: "I came down and saw Mr. Fox. He was holding my mother up against the parlor door. I came forward, and my brother came out and asked what all this meant. He said: 'Just this: if you interfere with my business, I will shoot you dead,' and reached in his back pocket. . . . He said: 'I came to take this organ out of here. If you interfere with my business, I will shoot you.' Then my brother said: 'You do not take this organ out of this house. Show your authority. If you don't, you take it over my corpse.' . . . Then he clinched my brother. . . . Then the two colored men came in, and began knocking us about. . . . I then went to the corner and saw a policeman, and asked him to come down. He came down, and Fox said: 'Arrest this man (meaning my brother), and I will appear against him in the morning.' They arrested my brother, and he was taken to the station."

This action was brought by McClung to recover damages for this high-handed and hostile invasion of his home. On the trial, the learned judge of the court below told the jury that the conduct of Fox "was without mitigation, and deserving of the severest condemnation," but that whether Dearborne was responsible for it or not, depended on the instructions he gave him when he started out on the expedition. The correctness of this instruction is the point on which this appeal depends.

The general doctrine laid down by the learned judge, that every man is liable for his own trespass only, must not be taken too literally; for one must be held to do that which he procures or directs another to do for him, as well as that which he does in his own person: *Qui facit per alium, facit per se*. Servants and employees are often without the means to respond in damages for the injuries they may inflict on others by the ignorant, negligent, or wanton manner in which they conduct the business of their employer. The loss must be borne in such cases by the innocent sufferer, or by him whose employment of an ignorant, careless, or wanton servant has been the occasion of the injury, and under such circumstances it is just that the latter should bear the loss. But the master is not liable for the independent trespass of his servant. If a coachman, while driving along the street with his master's carriage, sees one against whom he bears ill-will at the side of the street, and leaves the box to seek out and assault him, the master would not be liable. Such an act would be the willful and independent act of the coachman. It was done while in his master's service, but not in the course of that service. But if the coachman sees his enemy sitting on the box of another carriage, driving along the same highway, and he so guides his own team as to bring the carriages into collision, whereby injury is done, the master is liable. The coachman was hired to drive his master's horses. He was doing the work he was employed to do, and for the manner of his doing it the master is liable: Wood on Master and Servant, sec. 277. It would be no defense to the master to prove that he had given his coachman orders to be careful, and not drive against others. It was his duty not only to give such orders, but to see that they were obeyed. It will be seen, therefore, that it is the character of the employment, and not the private instructions given by the master to his servant, that must determine the measure of his liability in any given

case. An excellent illustration is afforded by the case of *Garretzen v. Duenckel*, 50 Mo. 104; 11 Am. Rep. 405. The defendant was a gunsmith. In his absence from his store, a clerk was waiting upon a customer who wanted to buy a rifle. The customer desired to see it loaded, and would not buy unless this was done. The orders of the defendant to his clerk were, that he should not load a rifle in the store. The customer was so earnest in desiring it, that the clerk loaded it, and by accident it was discharged, the ball injuring the plaintiff, who was sitting at a window on the opposite side of the street. The defendant set up his orders to his clerk as a defense, but it did not prevail. The court said: "There is no pretense that he (the clerk) was endeavoring to do anything for himself. He was acting in pursuance of authority, and trying to sell a gun, to make a bargain for his master; and in his eagerness to subserve his master's interests, he acted injudiciously and negligently."

In the case now before us, Dearborne sent Fox and his helpers to the house of McClung for the purpose of seizing and bringing away the organ. He says: "I told him to take the men and team when he was ready, and to bring the organ in, but to be careful, and not to have any row about it." Black, who drove the team, testifies: "Mr. Dearborne told Fox to go down and get this organ on South Sixteenth Street; to get it as peaceably as possible, and not to have any assault and battery, or any disturbance whatever." These directions show that Dearborne knew that the errand on which he sent his employees was one that was likely to result in trouble, and would require to be managed with great coolness and care, in order to avoid collision and a breach of the peace. But however the rule may be held in regard to the criminal liability of the master, under such circumstances, it is very clear that he cannot escape liability civilly by virtue of his instructions to his servant as to the manner of doing an act which the servant is to undertake on his behalf. He knew that the invasion of McClung's house, in the manner contemplated, was likely to excite indignation and resistance on the part of the inmates, and that what ought to be done might have to be determined under excitement, and without time for consultation or reflection by his employees. Under such circumstances, he puts them in his own stead, and he is bound by what they do in the effort to do the thing which was committed to them: *Sanford v. Eighth Ave. R. R. Co.*, 23 N. Y.

343; 80 Am. Dec. 286; *Lake Shore etc. R'y Co. v. Rosenzweig*, 113 Pa. St. 519; *Pittsburg etc. R'y Co. v. Donahue*, 70 Pa. St. 119; *Hays v. Millar*, 77 Pa. St. 238; 18 Am. Rep. 445; *Garretsen v. Duenckel*, 50 Mo. 104; 11 Am. Rep. 405.

The defendant was bound not only to give proper instructions to his servants when sending them on such an errand, but he was bound to see that his instructions were obeyed. In the leading English case of *Seymour v. Greenwood*, 6 Hurl. & N. 859, referred to at some length in *Wood on Master and Servant*, sec. 297, it is said: "If the act is done within the scope of the servant's employment, and is done in the master's service, an action lies against the master, and he is liable, even though he has directed his servant to do nothing wrong." Here Fox and his helpers were sent to bring away the organ. The acts complained of were committed in the course of and as a means to the accomplishment of that for which they were sent. Let it be conceded that they were instructed to do no wrong, and that they did what they were warned not to do. The master is nevertheless liable. When he sends them upon an errand that exposes them to resistance and danger, and the excitements consequent upon the presence of such a state of things, he must take the chances of their self-control and ability to obey. If he finds the risk inconveniently expensive, he may conclude to respect the homes of inoffensive citizens, and rely on his legal remedies for the recovery of any property to which he may claim title hereafter. The jury should have been told that the defendant was liable for what the learned judge aptly characterized as an "unjustifiable outrage" by his employees, and they should have been allowed to assess adequate damages for the breach of the plaintiff's close, if the entry was forcible, and for all the injury done him by any and all the defendant's servants while engaged in the business of seizing and carrying away the organ. All the circumstances may be considered in fixing the compensation to be awarded to the plaintiff.

Judgment reversed, and a *venire facias de novo* awarded.

MASTER AND SERVANT—LIABILITY OF MASTER FOR SERVANT'S ACTS.—The act of a servant pursuant to his master's order, or in the regular course of his employment, is considered in law to be the act of the master: *Santo v. Maynard*, 57 Conn. 157. A master is civilly responsible for the wrongful act of his servant, when done in the regular course of his authority, although the master may have prohibited the servant from doing the act: *Whitehead*

v. St. Louis etc. R'y Co., 99 Mo. 264; *North Chicago etc. R'y Co. v. Gasika*, 128 Ill. 613; *Texas T. R'y Co. v. Johnson*, 75 Tex. 153; *Atchison etc. R. R. Co. v. Randall*, 40 Kan. 421; *Yates v. Southwestern etc. Co.*, 40 La. Ann. 467. But the act complained of must pertain to the servant's particular duties: *Stringer v. Missouri P. R'y Co.*, 96 Mo. 299. See also *Dillingham v. Russell*, 73 Tex. 47; 15 Am. St. Rep. 753, and note.

CENTRAL NATIONAL BANK v. DREYDOPPEL.

[184 PENNSYLVANIA STATE, 492.]

IRREGULAR INDORSER OF PROMISSORY NOTE LIABLE ON HIS INDORSEMENT

WHEN. — One who indorses a promissory note drawn payable to the order of the maker before the latter has indorsed it will be liable to the holder after the maker has indorsed and negotiated it, notwithstanding the indorsement of the maker and payee is written beneath the signature of the irregular indorser.

ASSUMPSIT against the defendant as indorser. The opinion states the case.

J. S. Freeman and John F. Keator, for the appellant.

E. Hunn Hanson, for the appellee.

PAXSON, C. J. The promissory note in controversy was made by Jones and Eaton, payable to their own order as payees. It was indorsed by William Dreydoppel, the defendant, and subsequently by the payees. This constituted what is known as an irregular indorsement; and the defendant claims that by reason thereof he is not liable to the plaintiff, who is the holder. The responsibility of such an indorser, however much it may have been doubted at one time, is now well understood. "Nobody ever doubted," said Justice Sharswood, in *Eilbert v. Finkbeiner*, 68 Pa. St. 247, 8 Am. Rep. 176, "that when a man puts his name on the back of negotiable paper before the payee has indorsed it, he means to pledge, in some shape, his responsibility for the payment of it. . . . This court finally settled that in the absence of legal evidence of any different contract, he assumes the position of a second indorser; and that, to render his engagement binding as to any holder of the note, the implied condition that the payee shall indorse before him must be complied with so as to give him recourse against such payee"; citing *Schafer v. Farmers' and M. Bank*, 59 Pa. St. 144. It will be seen that the reason of the rule laid down in the line of cases of which those cited form a part is, that unless the payee is the first indorser,

there can be no recourse against him. In the case in hand, the reason of the rule does not apply, because the payees are also the makers of the note; hence the defendant, although entitled to the position of second indorser, is deprived of no valuable rights, as he can sue the payees as makers of the note. Their responsibility to him is precisely the same as if they had indorsed the note as payees before he placed his indorsement upon it. We are of opinion that the defense set up in the affidavit is insufficient, and that the judgment was properly entered.

Judgment affirmed.

NEGOTIABLE INSTRUMENTS — INDORSEMENT. — One who writes his name in the blank on the back of a negotiable instrument before it has been indorsed by the payee, who subsequently indorses it, is bound only as a second indorser: *Greusel v. Hubbard*, 51 Mich. 95; 47 Am. Rep. 549; *Sawyer v. Brownell*, 13 R. L. 141; 43 Am. Rep. 19; *Hayden v. Weldon*, 43 N. J. L. 128; 39 Am. Rep. 551, and note. But see note to *Jones v. Goodwin*, 2 Am. Rep. 475.

HARRISON AND BROTHER v. HOMŒOPATHIC ASSOCIATION.

[124 PENNSYLVANIA STATE, 553.]

MECHANIC'S LIEN, TIME TO FILE, NOT EXTENDED BY WORK DONE TO COMPENSATE FOR DEFECTIVE PERFORMANCE OF CONTRACT. — The time for filing a mechanic's lien is not extended by the doing of work or the furnishing of material to compensate for a deficiency in the work done and material furnished and charged for more than six months previously.

MATERIAL-MAN CANNOT FILE MECHANIC'S LIEN FOR PORTABLE LAUNDRY STOVE not used or intended to be used as a part of the building, but an ordinary piece of personal property, as much adapted for use in one laundry as in any other, notwithstanding the fact that it was furnished to the contractor under a contract which included materials for the construction of the building.

SCIRE FACIAS upon a mechanic's lien. The facts are stated in the opinion.

John G. Johnson and William Henry Lex, for the appellants.

Paschal H. Coggins and Richard P. White, for the appellee.

McCOLLUM, J. If the facts alleged in the affidavit of defense appeared in the appellants' testimony, it was the duty of the court, on the motion of the appellee, to enter a compulsory nonsuit. When this case was here before (120 Pa.

St. 28), it was decided that neither the furnishing and setting of the two soapstone hearths on the 9th of March, 1887, to compensate the deficiency in the work done and charged for on the 7th of July, 1886, nor the furnishing and setting of a portable laundry stove, which was not used or intended to be used in the construction of the building, but was an ordinary piece of personal property, "as much adapted for use in one laundry as in any other," extended the time for filing the lien.

The evidence produced by the appellants on the trial brought their case fairly within the principles of this decision, and demonstrated that their claim was not filed in time. They proved that the two soapstone hearths put in by them on the 9th of March were to supply the two broken scapstone hearths included in their charge of the 7th of July preceding; that they were required by the architect to replace the broken hearths with sound ones, and that they did so without protest or additional compensation. They admit that they made no extra charge against the owner or contractor for the new hearths, and that they were not present when the broken hearths were set; and they failed to show, by their workmen, who delivered the hearths in place, that they were then sound and in good condition. It is obvious, from the appellants' account of the transaction, that the new hearths were supplied by them gratuitously, to compensate for the defective hearths they had previously furnished. It clearly appears from their testimony that these hearths were broken when first seen and inspected by the architect, and whether their condition was caused by defective materials or defective setting is unimportant. It is true that their bill of particulars contained a charge, under date of March 9, 1887, of \$18.50 for two soapstone hearths, and a credit of like amount for two soapstone hearths, but in view of their explanation of them, these entries are of no consequence.

It was held in *McKelvey v. Jarvis*, 87 Pa. St. 414, that work done to compensate defective performance of a contract for work and material in the construction of a building will not preserve the lien, but that work substituted for that called for in the contract may do so. In the former case the contract is unchanged, the work is done without charge to the owner or contractor, and to make good the previous default of the mechanic or material-man; in the latter, the work is done under a contract modified by the agreement of all the parties interested in it. This distinction was noted and illustrated by our

brother Clark in *Homoeopathic Ass'n v. Harrison*, 120 Pa. St. 28.

The rule laid down in *McKelvey v. Jarvis*, 87 Pa. St. 414, is not in conflict with the decision on the claim of Brenneman and Ward in *Parrish's Appeal*, 83 Pa. St. 111. In that case the work done by the claimants was in exact compliance with the terms of their contract with the owner, and the alteration of the mud-drums was made necessary by a mistake in the drawings furnished by the latter. It was not done to compensate a deficiency in the work of the claimants, but was required by the owners to correct their own error, at their own expense.

The laundry stove was included in the specifications for the hospital, and in the proposal of the appellants, which was accepted by McNichol, the contractor. It was placed in the laundry-room of a building which was not embraced in McNichol's contract, and the appellants knew its destination before they delivered it. It was a portable stove constructed for the purpose of heating laundry-irons, but it was no more a part of the building than an ordinary parlor or kitchen stove. It was accurately described in the affidavits of defense, as the appellants' testimony clearly shows. The mere fact that it was furnished under a contract which included materials for the construction of the building does not entitle the materialmen to a lien for it. A contract to build and furnish a dwelling-house according to certain plans and specifications, and for an entire price, would not confer upon the contractor a right to a lien for the portable stoves, the carpets, and other furniture essential to its use as a dwelling. In *Dimmick v. Cook Co.*, 115 Pa. St. 573, the claimant was allowed a lien for steam-heating apparatus and engine, laundry apparatus, ranges, and cooking apparatus, etc.; but these things were not only included in the original plans and designs of the building, but were permanently located in it by masonry, pipes, shafting, etc. The lien was sustained upon the ground that the apparatus was permanent in its character, a constituent part of the building, and would pass with the freehold.

As we have seen, the appellants are not entitled to a lien for the soapstone hearths put in on the 9th of March, 1887, nor for the laundry stove furnished on the 27th of May following. The last work done and materials furnished by them for which they could have a lien was on the 30th of October,

1886, and they did not file their claim until the 25th of June, 1887. As the claim was not filed in time, the nonsuit was rightly entered.

Judgment affirmed.

MECHANICS' LIENS, TIME OF FILING, ETC. — Mechanic's lien statutes must be liberally construed: *Greeley v. Harris*, 12 Col. 226. The party seeking to avail himself of the benefits of the statute must follow strictly its requirements: *Buller v. Guin*, 128 Ill. 23. In Illinois, to give one furnishing labor and materials the benefit of a mechanic's lien, the contract must stipulate for payment within one year from the completion of the building; and if the price is to be so paid, the lien attaches, even though there is given an extension of time for payment: *Chisholm v. Williams*, 128 Ill. 115. Notice of the lien given within thirty days after the completion of the work is sufficient: *Silvester v. Mining Co.*, 80 Cal. 510; *Bassett v. Brewer*, 74 Tex. 554. In New York, the binding effect of the lien ceases after the expiration of ninety days from the date of its filing, unless suit is commenced within that period or the lienor is made a party to an action to enforce another lien: *Danziger v. Simonson*, 116 N. Y. 329; but in Vermont, not only must suit be instituted but the property must be actually attached within ninety days: *Piper v. Hoyt*, 61 Vt. 539. During the time that the lien is in force under the provisions of the statute, every one dealing with the property is charged with notice of its existence: *Improvement Co. v. Electric Light etc. Co.*, 74 Tex. 605.

MECHANIC'S LIEN, WHAT PROPERTY SUBJECT TO. — Liens may be filed against houses and other property for work and materials given in putting up fixtures, such as ranges and heaters: *Schaper v. Bibb*, 71 Md. 145; or a pump and pipes: *Goss v. Helbing*, 77 Cal. 190; or water-pipes: *Buffala Water Co. v. Addyston Pipe Co.*, 89 Ala. 552; or an electric-light plant: *Mulholland v. Thomson-Houston Electric Co.*, 66 Miss. 339.

GOULD v. DWELLING-HOUSE INSURANCE COMPANY.

[134 PENNSYLVANIA STATE, 570.]

ADMISSIBILITY OF PROOFS OF LOSS IN ACTION ON POLICY OF INSURANCE SHOULD BE PASSED UPON WHEN. — If in an action upon a policy of insurance the defendant objects to the proofs of loss, it is more regular and the better practice to first hear evidence of a waiver, and then pass upon the admissibility of the proofs of loss; but if evidence of waiver be subsequently given sufficient to take that question to the jury, it is a mere matter of the order of proof, which is within the discretion of the court.

NOTICE OF OBJECTION TO PROOFS OF LOSS, DUTY OF INSURER TO GIVE, PROMPTLY. — If the insured, in good faith and within the stipulated time, does what he plainly intends as a compliance with the requirements of his policy in respect to proofs of loss, good faith requires that the insurer shall promptly notify him of objections thereto, so as to give him the opportunity to obviate them; and mere silence may so mislead him to his disadvantage as to be of itself sufficient evidence of waiver by estoppel. But if without valid reason the insured fails to comply with

the requirements of his policy at all, or to do so within the stipulated time, then the liability of the insurer is discharged, and mere silence or investigation, or even negotiation, will not revivify the contract. Nothing will do that short of an express agreement, or a change of position by the insured, to his disadvantage, reasonably induced by the acts of the insurer.

INSURER IS NOT RELIEVED FROM DUTY OF GIVING NOTICE OF HIS OBJECTIONS to the proofs of loss by the insured by the fact that the proofs were received only three days prior to the end of the period limited for their presentation. Where the proofs are in time, there is no room to speculate what the insured might, by diligence, have done in the three days left to him. He has a right to have an opportunity to correct the defects in his proofs, if he can.

RULE THAT OFFERS OF COMPROMISE ARE NOT ADMISSIBLE NOT TRANSGRESSED WHEN. — The rule that offers of compromise are not admissible is not transgressed by admitting testimony of an offer of an insurer to compromise solely on the question of waiver, and limited carefully to that in the charge to the jury, and not as evidence of the plaintiff's claim.

CONDITIONS AGAINST ENCUMBRANCES IN POLICY OF INSURANCE NOT VIOLATED WHEN. — Where the insured, when applying for the insurance, informs the insurer of the amount of encumbrances then existing upon the property, and the latter issues the policy with knowledge of such encumbrances, the condition against encumbrances is not violated, if their amount never exceeds the amount stated.

RATIFICATION OF ASSIGNMENT OF INSURANCE POLICY. — If a policy of insurance contains a provision that it shall be void if assigned before a loss, without the consent of the insurer indorsed thereon, and the insurer places on it an indorsement making the loss, if any, payable to a third person, this indorsement operates as a ratification of a prior agreement of the insured to the same effect, made without the previous consent of the insurer.

ASSUMPSIT upon a policy of insurance. The facts appear from the opinion.

H. N. Williams, N. C. Elsbree, and R. H. Williams, for the appellant.

Rodney A. Mercur and James H. Webb, for the appellee.

MITCHELL, J. In regard to the first assignment of error, to the overruling of the defendant's objection to the proofs of loss, it would have been more regular and much better practice to have heard the evidence of a waiver first, and then passed upon the admissibility of the proofs of loss. But if the evidence of waiver was in fact, though subsequently, given, sufficient to take that question to the jury, then it was a mere matter of the order of proof, which is within the discretion of the judge.

That a statement was furnished within the stipulated time is admitted, but that it was not such as the policy required

we must assume, as the learned judge so charged the jury. There is, however, nothing to show that it was not in good faith intended by the plaintiff as a compliance with the requirement of the policy. Under such circumstances, it has often been declared by this court that it is the duty of the insurance company, if it means to rely upon failure to comply with this stipulation, to give immediate notice of its objection, pointing out the defects, etc: *Girard Life Ins. Co. v. Mutual Life Ins. Co.*, 97 Pa. St. 24, and cases there cited by the present chief justice; *Ben Franklin F. Ins. Co. v. Flynn*, 98 Pa. St. 627; *Susquehanna M. F. Ins. Co. v. Cusick*, 109 Pa. St. 159; *Universal F. Ins. Co. v. Block*, 109 Pa. St. 535; *Thierolf v. Universal F. Ins. Co.*, 110 Pa. St. 37. And it is equally settled that the actions of the company, including the failure to return the proofs of loss or to give notice of the objections, are evidence for the jury of a waiver: *Snowden v. Kittanning Ins. Co.*, 122 Pa. St. 502. The testimony as to what the company did was admitted by the learned judge in the present case as evidence of waiver, and in so doing he followed the line of decisions above cited, and therefore was clearly right.

In establishing this rule in regard to the conduct of insurance companies as to objections to proofs of loss, it is not intended to encroach at all on the doctrines of waiver by estoppel, as laid down in the well-considered and authoritative cases of *Trask v. State Fire & M. Ins. Co.*, 29 Pa. St. 198; 72 Am. Dec. 622; *Beatty v. Lycoming etc. Ins. Co.*, 66 Pa. St. 9; 5 Am. Rep. 318; and others of the same kind. In *Trask v. State Fire & M. Ins. Co.*, 29 Pa. St. 198, 72 Am. Dec. 622, the policy required that the assured should notify the company of his loss "forthwith," and it was held that a delay of eleven days, unexcused, was a breach of this requirement, and that the fact of the company's receipt of the notice, without objection, was not sufficient evidence of waiver. This has been called a harsh case as to the time, but nevertheless was followed: *Edwards v. Lycoming Co. M. Ins. Co.*, 75 Pa. St. 378. In *Beatty v. Lycoming etc. Ins. Co.*, 66 Pa. St. 9, 5 Am. Rep. 318, a notice was sent by the insurer, but it was so defective that it was held to be "no statement at all, . . . a mere reiteration of the description in the policy"; and Sharswood, J., in delivering the opinion, said, "to constitute a waiver, there should be shown some official act or declaration by the company, during the currency of the time, dispensing with it; something from which the assured might reasonably infer that the under-

writers did not mean to insist upon it. . . . After the thirty days had expired without any statement, nothing but the express agreement of the company could renew or revivify the contract." But, notwithstanding the stringent terms in which the rule is thus laid down, the ground of the decision is the entire failure of the insured to send anything that could be considered the statement called for. This is clearly shown by what is immediately added: "Had a statement been furnished within the time, it might have been the duty of the insurers to notify the assured of any merely formal defect, so that it might be remedied." This duty, as shown by the later cases already cited, is now clearly defined and settled, and that these cases are not at variance with the apparently stricter previous rulings is shown by the references made to the latter from time to time. Thus in *Lycoming Co. M. Ins. Co. v. Schollenberger*, 44 Pa. St. 261, Thompson, J., says: "This court has never held that a waiver . . . may not take place during the currency of the condition. The cases of *Barclay v. Weaver*, 19 Pa. St. 396, 57 Am. Dec. 665, and *Trask v. State F. & M. Ins. Co.*, 29 Pa. St. 200, . . . only decide that it did not in those cases, as time for the performance of the condition had passed. And in *Imperial F. Ins. Co. v. Dunham*, 117 Pa. St. 473, 2 Am. St. Rep. 686, our brother Clark, after citing *Trask v. State F. & M. Ins. Co.*, 29 Pa. St. 200, 72 Am. Dec. 622, says: "It is undoubtedly true that where an insurance company is, from any cause, discharged from liability, responsibility for the loss will not reattach by waiver, without proof of authority," etc.

The distinction between the two lines of cases is the time at which the acts alleged to prove waiver are done. Proofs of loss are acts to be done by the assured for the information of the insurer, and the stipulation for them, as said by Strong, J., in *Inland Ins. & Dep. Co. v. Stauffer*, 33 Pa. St. 404, is, "at most, a condition precedent, not to the undertaking of the insurer, but to the right of action of the insured"; and the cases agree that substantial compliance is all that is required. The result of the decisions may therefore be formulated in the following rule: If the insured, in good faith, and within the stipulated time, does what he plainly intends as a compliance with the requirements of his policy, good faith equally requires that the company shall promptly notify him of their objections, so as to give him the opportunity to obviate them; and mere

silence may so mislead him, to his disadvantage, to suppose the company satisfied, as to be of itself sufficient evidence of waiver by estoppel. But if without valid reason he fails to comply with the requirements of his policy at all, or to do so within the stipulated time, then the liability of the company is discharged; and mere silence, or investigation, or even negotiation, will not, in the words of Sharswood, J., in *Beatty v. Lycoming etc. Ins. Co.*, 66 Pa. St. 9, 5 Am. Rep. 318, "revivify the contract." Nothing will do that, short of an express agreement, or a change of position by the insured, reasonably induced by the acts of the company, and to his disadvantage. Mere disappointment in the expectation of a settlement, even though such expectation be founded on the acts of the company, as in *National Ins. Co. v. Brown*, 128 Pa. St. 386, will not be enough.

All of the reported cases may not be easy to bring into entire conformity with this rule. They are very numerous, and sometimes are decided on their own very exceptional facts. But none of them depart far, if at all, in principle, from the rule; and such as may not be absolutely consistent in its application must be considered as accidental departures from the established general line.

The present case falls within the first branch of the rule. The proofs of loss were furnished within the prescribed time, and it was the duty of the company to give prompt notice of its objections, so that they might be obviated. It is argued that as the proofs were received only three days prior to the end of the period limited, the plaintiff could not have remedied the defects in time, and therefore notice would have been useless. We will not undertake to say now how far the strict limitation as to time may control the right to correct defects in proofs duly furnished. That case will be decided when it arises. Here the proofs were in time, and we need not speculate what the plaintiff might by diligence have done in the three days left to him. It is sufficient for this case that the company gave him no chance. The first and seventh assignments of error are not sustained.

The second and fourth errors complained of seem, at first sight, to come dangerously near transgressing the settled rule that offers of compromise are not admissible. But examination shows that the offer of settlement in this case was not admitted as evidence of plaintiff's claim. Indeed, the fact of loss was not in dispute, nor its amount; and the evidence was

admitted on the question of waiver, and was carefully limited to that in the charge. So regarded, it was free from error.

The other assignments raise three questions as to encumbrances not indorsed on the policy: 1. Was parol notice of the existing encumbrances, given before the issue of the policy, sufficient? 2. Was the condition against encumbrances broken by the entry of the subsequent judgment? and 3. Was the interest of the insured changed, or the hazard of the insurance increased, by the subsequent judgments? Bearing in mind that the jury have found that plaintiff, when applying for the insurance, informed the agent of the amount of encumbrances then existing, and that the company issued the policy with such knowledge, and further, that though the items of encumbrance were somewhat changed, the amount stated was never exceeded, this case bears so close a likeness to *Kister v. Lebanon Mut. Ins. Co.*, 128 Pa. St. 553, 15 Am. St. Rep. 696, that it is not necessary to do more than refer to the opinion in that case to dispose of these questions.

There remains only the question of the agreement that the loss, if any, should be payable to Robinson and Son. The condition of the policy is, that if it be assigned before a loss without the agreement of the company, it shall be void. But as such agreement is indorsed on the policy, the fact that the qualified assignment, such as it is, was made before the indorsement, even if proved, would be entirely immaterial. The indorsement by the company was a ratification, which is equivalent to prior consent.

Judgment affirmed.

INSURANCE — PROOFS OF LOSS. — The insurer must point out defects in proofs of loss, and must give the assured all reasonable facilities for ascertaining such defects, as well as an opportunity to correct them. In the absence of this, the company will be considered as having waived the defects: *Birmingham F. Ins. Co. v. Pulver*, 126 Ill. 329; 9 Am. St. Rep. 598, and note. But unless there is a waiver, proofs of loss must be furnished by the assured within a reasonable time: *Knudson v. Hekla F. Ins. Co.*, 75 Wis. 198; or within the time stipulated in the policy: *Von Genechtin v. Citizens' Ins. Co.*, 75 Iowa, 544; *Welsh v. Des Moines Ins. Co.*, 77 Iowa, 376; *McCormack v. North British Ins. Co.*, 78 Cal. 469; *Township of Sidney v. Des Moines Ins. Co.*, 75 Iowa, 647. An unexplained delay of fifty days is unreasonable: *Pickel v. Phenix Ins. Co.*, 119 Ind. 292. The law does not require an impossible thing of an assured, so that he may excuse himself by proving the impossibility of complying with the terms of the policy in furnishing proof of loss: *People's F. Ins. Co. v. Pulver*, 127 Ill. 246. Receiving and holding proofs of loss without objection constitutes a waiver as to the time in which such proofs should have been presented: *Loeb v. American Cent. Ins. Co.*, 99 Mo. 50.

McFARLAND v. KITTANNING INSURANCE COMPANY.

[134 PENNSYLVANIA STATE, 90.]

PAROL EVIDENCE IS ADMISSIBLE TO SHOW WAIVER BY ACTS IN PAIS OF INSURER, notwithstanding a stipulation in the policy that nothing less than an express agreement indorsed on the policy shall be construed as a waiver of any of its conditions or restrictions. But if the policy contains a condition that it shall be void if the property insured be encumbered at its date, or afterwards become so, without notice to the insurer, it will be the duty of the insured to establish the parol waiver by a clear preponderance of evidence.

EVIDENCE OF WAIVER, WHAT SUFFICIENT.— Where an insurer, having knowledge of all the facts upon which he might be able to avoid the policy, misleads and delays the insurer by promising to pay the loss, prevents him from rebuilding by his negotiations, puts him to the trouble and expense of proving his loss, and procures the adjustment, by appraisers, of the amount of the loss, binding and conclusive under the conditions of the policy, there is sufficient evidence of waiver to go to the jury.

ASSUMPT upon a policy of insurance. The opinion states the facts.

A. A. Stevens and G. L. Owens, for the appellant.

John D. Blair, for the appellee.

MITCHELL, J. The subject of waiver by acts *in pais*, notwithstanding stipulations in a policy of insurance that nothing less than an express agreement indorsed on the policy shall be effectual for that purpose, has just been considered in *Gould v. Dwelling-House Ins. Co.*, 134 Pa. St. 570, *ante*, p. 717, (opinion filed herewith), and we refer to the review of the cases there made to show that the charge of the learned judge, that evidence of a parol waiver was not competent, cannot be sustained. Before reaching the conclusion, however, that the case was wrongly withdrawn from the jury, we must examine the facts set up as evidence of a waiver.

The policy contained rather unusually stringent conditions that if the property was encumbered, by judgment or otherwise, or should become so encumbered, without the consent of the company indorsed thereon, it should cease to be binding on the company, and that nothing less than a specific agreement, clearly expressed and indorsed on the policy, should be construed as a waiver of any of the conditions. It is undisputed that there were encumbrances at the date of the policy, and others subsequently, of which no notice was given or consent obtained. The liability of the company was therefore

discharged if the company chose to so treat it, and had it remained passive there would have been no cause of action. But in fact the company did not remain passive. On receipt of the proofs of loss, the secretary wrote, asking for further information, which was furnished. An agent then called on plaintiff, with the proofs of loss in his possession, examined the remains of the fire, and according to plaintiff, produced a list of the liens from the docket of the court, received explanations in regard to them, and then demanded an appraisalment under the terms of the policy. This latter statement and some others are denied by the defendant, but for the present purpose we must assume that the jury would have found them to be true. After some delay, appraisers were appointed by the parties, respectively, and an adjustment of the loss was made, which the agent of the company then promised should be paid in ninety days. These negotiations lasted nearly five months, and plaintiff alleges that during that time he was prevented from rebuilding his barn, and suffered other inconveniences and damage in consequence. In addition to this, the adjustment of the loss by the appraisers was, under the twenty-second condition of the policy, binding and conclusive as to amount; and though they might give him but a small part of what he deemed his loss, the plaintiff was nevertheless barred, by his submission, from any larger claim.

Do these facts, assuming the jury to find them, afford sufficient evidence of such a change in plaintiff's position, to his detriment, and in reliance on the acts of the company, as will justify the jury in finding a waiver, under the second branch of the rule laid down in *Gould v. Dwelling-House Ins. Co.*, 134 Pa. St. 570, *ante*, p. 717. In *Coursin v. Pennsylvania Ins. Co.*, 46 Pa. St. 323, the facts constituting the waiver are not reported, but the language of Justice Thompson, on page 331, is closely applicable to the present case: "If it [the company] acted and promised, after the action was legally barred, as if it did not intend to insist on the limitation, and put the party to trouble, expense, and anxiety in regard to his claim, they need not complain of a jury finding that they did waive it." And in *Niagara F. Ins. Co. v. Miller*, 120 Pa. St. 504, 517, 6 Am. St. Rep. 726, the present chief justice says: "If, with the knowledge in its possession of every fact upon which to avoid the policy, they misled the plaintiff for nearly a year, subjected him to the expense of procuring plans and specifications of his building, and never informed him that they would not

pay because the policy was avoided, they have no ground to complain if they are now held to be estopped from setting up such a defense." In this last case, and also in *Snowden v. Kittanning Ins. Co.*, 122 Pa. St. 502, the facts relied upon to establish a waiver were certainly no stronger than they appear to be in the present; and under those decisions, the latest and most analogous of a long line, we must hold that the evidence in the present case should have gone to the jury on the question of waiver.

The learned judge apparently fell into error by following *Universal M. F. Ins. Co. v. Weiss*, 106 Pa. St. 20, too literally. Some of the expressions in the opinion therein upon the question of waiver of proofs of loss would probably justify the taking of the present case from the jury. But the opinion must be read in its connection, as applied to the evidence. The principle of waiver by acts and declarations is expressly stated by the learned judge, but he then proceeds to the facts, and says that of waiver as to proofs of loss there was no sufficient evidence, and of waiver as to time of bringing suit, no evidence at all. Upon its facts, the decision is in line with the others already cited.

I have, of course, discussed the case entirely from the plaintiff's point of view of the facts. The truth of plaintiff's own testimony, of Crawford's contradiction of it, of the latter's knowledge of the encumbrances before his demand for appraisal, the extent of his authority, and how far his knowledge is that of the company, and other like questions, are for the jury on the weight of the evidence. The omission of notice of encumbrances is not, however, a mere formal defect, but a breach of a substantial condition of the insurance; and in view of this fact, and of the express stipulation in the policy that nothing should amount to a waiver unless specifically agreed to and indorsed on the policy, it will be the duty of the plaintiff to establish the parol waiver by a clear preponderance of evidence. But where a case is taken from the jury, and decided as a matter of law upon the sufficiency of the evidence, we must (as in cases of nonsuit: *Elkins v. Susquehanna F. Ins. Co.*, 113 Pa. St. 386) treat the plaintiff's case as though the jury had found it to be true. Upon the actual facts or the weight of the evidence we indicate no opinion; indeed, we have none.

Judgment reversed, and *venire de novo* awarded.

INSURANCE — PAROL WAIVER. — An insurance company or its general agent may waive, orally, a condition in the policy, notwithstanding the policy provides that no agent of the company, or other person than the secretary or president, shall have authority to waive any of the terms or conditions of the policy, or make any indorsement thereon, and that all agreements by the officers named shall be signed by either of them: *German Ins. Co. v. Gray*, 43 Kan. 497; *ante*, p. 150, and note. A waiver by parol may be proved of a condition in an insurance policy; and the plaintiff may prove by parol evidence such a waiver, as such proof does not alter or vary the written contract: *Pine v. Merchants' Mut. Ins. Co.*, 19 La. Ann. 214; 22 Am. Dec. 529.

CASES
IN THE
SUPREME COURT
OF
TEXAS.

WAPLES & Co. v. OVERAKER & Co.

[77 TEXAS, 7.]

SALES. — RIGHT OF SELLER TO RESELL in satisfaction of unpaid purchase-money, if title, but not possession, has passed, is well settled; and if there is a contract to sell, and performance is tendered by the seller, the same rule applies.

SALES — RIGHT OF SELLER TO RESELL — NOTICE TO BUYER. — It is enough to authorize a resale that the defaulting buyer has notice of the facts which give the wronged seller the right to resell, when these consist of the absolute refusal of the buyer to comply with the contract of sale; and the place of resale is not then restricted to the place where, by the contract, the buyer was bound to receive the property; but the seller may ship to a distant market and sell, if in doing so he exercises good faith and due diligence, with intent to realize the best price he can on resale.

SALES — RIGHT OF SELLER TO RESELL. — When the right of the seller to resell arises from the absolute refusal of the buyer to receive the goods in compliance with the contract of sale, if the buyer desires to select the market for resale, he must receive the goods and send them to that market.

NEW TRIAL ON GROUND OF NEWLY DISCOVERED EVIDENCE will not be granted when such evidence was not only proper, but necessary, under the allegations of the pleadings on file at the time of the trial, and the moving party made no effort to procure it.

Hare, Edmonson, and Hare, for the appellants.

R. De Armond and C. N. Buckler, for the appellees.

STAYTON, C. J. Appellants, who were millers residing and doing business in the city of Sherman, made a contract with appellees under which the latter were to buy wheat at the market price in Collin County, where they lived.

This wheat they were to ship to appellants, who therefor were to pay the market price paid by appellees, freight from place of shipment to Sherman, and in addition to this, two and one half cents per bushel for such wheat as might be thus bought and shipped to appellants during the season of 1884.

Seven car-loads of wheat were thus bought by appellees early in July, and shipped to appellants, who, on the arrival of the wheat at Sherman, refused to receive it, whereupon it was shipped by appellees to New Orleans and there sold, but at a loss; and this action was brought to recover damages for breach of the contract.

There is some conflict in the evidence, but the case made by appellees was, in substance, this: The contract was proved as stated; on July 9th, appellees had bought under the contract, and had loaded in seven cars, 3,350 bushels of wheat, when they received a telegram from appellants directing them not to ship any more wheat at that time.

On receipt of that telegram, one of appellees, with samples of the wheat in the cars, went to Sherman and exhibited the samples to appellants, who then agreed to take the wheat at seventy cents per bushel, with freight and two and one half cents per bushel added; whereupon, on July 11th, the wheat was sent to Sherman, consigned to appellants, who refused to receive it, of which appellees were not informed until the 14th or 15th of that month, when they were notified by the railroad agent at Sherman that they had refused to receive the wheat, and that the railway company desired to use its cars, which were still standing on a side-track, with the wheat still in them. On receipt of this information, one of appellees went to Sherman to induce appellants to receive the wheat, but they refused to do this, and gave their written rejection of the wheat, basing that on claim that the wheat was inferior to samples furnished, which, in view of the evidence, the charge of the court, and the verdict of the jury, must be considered to have been untrue. Appellants were then informed that the railway company were pressing for the cars, that they would be held responsible for the breach of contract, and that appellees would be compelled to sell the wheat there or reship it if they did not receive it.

Appellees then tried to sell the wheat to other millers in Sherman, but were unable there to find a market for it, whereupon they sought a market for the wheat, through telegrams,

in Dallas, Houston, and Galveston, but were unable to find a market for the wheat in Texas; whereupon they were compelled to sack the wheat and ship it to New Orleans, where it was subsequently sold. It is further shown that New Orleans was considered the best market for Texas wheat, and that when appellants refused to receive the wheat at Sherman, wheat had fallen in price, and was selling at sixty-five cents per bushel.

One of appellees stated that he told one of appellants "that we could not sell the wheat in Sherman, and that the road had notified us that they wanted the cars, and that I would have to reship the wheat to some other point, where I could find sale for it. He just remarked, 'That is your business, not mine,' and kept on walking away from me, and did not seem disposed to talk about the matter."

After this, J. H. Hays was sent by appellees to Sherman to sell or reship the wheat still in the cars, and to sack it for shipment, if this became necessary.

This witness made another effort to sell the wheat in Sherman, but failed, when he sacked it and shipped to New Orleans. While in Sherman he also had a conversation with one of appellants, which, so far as pertinent, he states as follows: "I went to the Eagle Mills, the one owned by defendants, and there found defendant Paul Waples and one or two others. I stated that I had been sent by plaintiffs to see about that rejected wheat, and inquired what they proposed to do about it. I told Paul Waples that my instructions from Overaker were to either sell the wheat or to reship it. I told him the railroad would not let us have the cars much longer, and that something had to be done. To this Waples made no satisfactory reply; simply said that he could do nothing. . . . I simply told him that I had been sent by plaintiffs to sell or reship the wheat." Witness then stated the efforts he made to sell at Sherman, and that failing in that, the wheat was sacked and shipped to New Orleans.

After the conversation between Overaker and Paul Waples, before referred to, the former wrote (on July 16th) to appellants the following letter:—

"Montcastle [his partner] refuses to do anything about the seven cars wheat, so leaves it all on me. Mr. Paul, treat me like a white man over this thing. The wheat is there, and God knows I am willing to do the clean thing. You recollect all the time what you told me about buying wheat for you.

Now let me know what you will do for me about this. If the wheat was of my own to say about, I then could decide at once. Let me know. Yours, etc., H. C. OVERAKER."

The letter was not replied to, and was received by appellants before the conversation between them and Hays occurred.

It is not shown that there was any agreement to sell the wheat on credit, and in the absence of this, it must be presumed that it was to be paid for on delivery.

There may have been such constructive delivery and existence of such other facts as would have vested title to the wheat in appellants, but they cannot claim, under the facts shown, that such an absolute delivery had been made as would defeat the lien of appellees for the purchase-money.

The conduct of appellants forbids their claim that such a state of affairs existed.

They denied having any interest in the wheat or liability for its price, and refused to make their possession absolute.

Had they done the latter, appellees would have been driven to an action to recover the agreed price.

As the wheat stood in the cars, appellants refusing to receive and pay for it, it was the right of appellees to hold it until its price was paid, as they might have done had the wheat not been shipped to Sherman.

Appellants having refused to receive and pay for the wheat, appellees might have retained it and have recovered the difference between the contract price and the market price at time and place of delivery, or they might have held the property for appellants, and at their risk, and have recovered the purchase-money, which, under the agreement, would be the aggregate of freight paid and 72½ cents per bushel.

Appellees, however, were not bound to pursue either of these courses on the refusal of appellants to receive and pay for the wheat, for they had the right to resell and appropriate proceeds on the debt due them, and were not bound to run the risk of the insolvency of appellants, which they would do if they pursued either of the other courses suggested, nor were they bound to assume the risks resulting from fluctuation of markets or the perishable nature of the article.

The right of the seller to resell in satisfaction of unpaid purchase-money, if title, but not possession, has passed, seems to be well settled, and if there is a contract to sell, and performance be tendered by the seller, the same rule applies: *Whitney v. Boardman*, 118 Mass. 242; *McLean v. Richardson*,

127 Mass. 345; *Lewis v. Greider*, 51 N. Y. 231; *Jackson v. Covert*, 5 Wend. 141; *Smith v. Pettie*, 70 N. Y. 13; *Ullman v. Kent*, 60 Ill. 271; *Bagley v. Findlay*, 82 Ill. 524; *Pollen v. Le Roy*, 30 N. Y. 549; *Young v. Martins*, 27 Md. 115; *Gordon v. Norris*, 49 N. H. 382; 2 Schouler on Personal Property, 546, 549; Benjamin on Sales, 746, 747.

It is not contended that the measure of damages fixed by the charge of the court was erroneous, but it is urged that the court erred in permitting the application of that measure to this case because "there was no evidence of a direct notice of an intention to ship to New Orleans having been given; and further erred in charging 'that a simple notice of intention to sell was all that was required of plaintiffs before shipping to a distant market'; and further erred in instructing the jury 'that after simply giving notice to defendant of an intention to sell the wheat, plaintiffs had the right to sell in a distant market if plaintiffs found themselves either unable to sell in Sherman or that they could get a better price by shipping to a distant market.' "

In reference to these matters, the court instructed the jury as follows: "If, however, you find that the wheat was as good as the samples, and defendants refused to accept the same, then plaintiffs had the right, after giving notice to defendants, to sell the same for the best attainable market price, and if they were unable to sell in the market at the place of delivery, or could get a better price by shipping, they had a right to ship and sell at the best and most convenient market; hence if you find that plaintiffs complied with their part of the contract, and defendants did not comply with their part, and if plaintiffs gave defendants notice of their intention to sell the wheat, and plaintiffs afterwards did sell or cause the same to be sold within a reasonable time, and if it was necessary for them to transport the wheat to get a market for it, then and in that case you will find damages for plaintiffs" etc.

Another part of the charge made the right of plaintiffs to recover under the rules applicable to cases of resale to depend on notice to defendants of intent to resell.

The evidence bearing on the question of actual notice of intent to resell was somewhat conflicting, but ample to sustain the finding of the jury on that issue.

We are of opinion that there was no error in the charge of the court as to the notice of intent to resell of which

appellants can properly complain, and that the charge was more favorable to them in this respect than it ought to have been under the uncontroverted facts of the case. That the wheat was tendered to appellants at the proper place of delivery is not controverted, nor is it denied that they absolutely refused to receive it. It was known that appellees were purchasers of wheat, and of the particular wheat, for sale at once, and not to hold. The wheat was known to be in cars the railway company was demanding; and we are of opinion that knowledge of these and other like facts conveyed to appellants notice of the vital fact necessary for them to know to authorize appellees to sell same to other persons and to subject them to the liabilities resting on the buyer who refuses to comply with his contract in cases in which the seller resells. They had notice and knowledge of appellees' legal right to sell to some other person, resulting from their unqualified refusal to comply with the contract to receive and pay for the wheat when tendered at the proper place of delivery.

It is enough that the defaulting buyer has notice of the facts which give to the wronged seller the right to resell, when these consist of the absolute refusal of the buyer to comply with the contract of sale: *Ullman v. Kent*, 60 Ill. 273; Schouler on Personal Property, sec. 551; *Saladin v. Mitchell*, 45 Ill. 80.

After notice of the right thus arising, notice of an actual intent to sell could only operate in the way of a threat to induce compliance. If having once refused to comply with the contract there be *locus penitentiae* for the buyer, he must avail himself of it without further notice or request from the seller.

There was nothing in the evidence from which it could have been understood that appellees intended to waive their right.

It is urged that appellees had no right to ship the wheat to New Orleans for sale, and make the price at which it there sold the basis of the recovery; that it should have been sold in Sherman or in the nearest market.

It is the duty of the seller in such a case to exercise good faith, and to realize the best price he can on resale; but if, in the light of the facts before him, obtained in the exercise of due diligence, he pursues the course which prudence would dictate to a man of ordinary prudence, then the defaulting buyer ought not to be heard to say that the market in which the thing was sold was not in fact the most advantageous one.

If appellants desired to select the market, they ought to

have received the wheat and sent it to that market. There are cases which seem to hold that the seller has not the right to ship to a distant market for sale when the buyer refuses to receive the thing bought: *Chapman v. Ingram*, 30 Wis. 290; *Rickey v. Tenbroeck*, 63 Mo. 568.

If such a rule was recognized, in case property could not be sold at the place where the buyer ought to receive it, the right of the seller to resell would be practically taken away. The true rule we believe to be that asserted in *Lewis v. Greider*, 51 N. Y. 231: "The place of sale is not necessarily restricted to the place where, by the contract, the vendee was bound to receive the property. The vendors, having, as they should, the interest of both parties in view, had the undoubted right, as a means of guarding against loss, to procure an insurance upon it; and within the rule that would justify such reasonable outlay to save it from loss, they should be permitted to exercise a reasonable discretion as to the place of sale, and to exercise it within a reasonable time." Whether the market selected and manner of sale was fair were questions open to inquiry; but from the evidence introduced, there is no reason to question either.

A motion for new trial was asked on the ground of newly discovered testimony, by which appellants proposed to show that a market might have been found for the wheat at Sherman, and at other places in Texas, at which it had been shown that appellees had tried without success to find a market; and as an excuse for not having the evidence on the trial, it was claimed that the original petition did not negative these facts, and that the contents of amended petition, filed the day before the trial, which did, were unknown to them.

No sufficient reason is shown why appellants did not ascertain what the amended petition was; they had opportunity to read it, and must have heard it read at the opening of the trial, and did not then claim surprise.

If, however, they were shown to have been excusably ignorant of the averments of the amended petition, this would not benefit them, for the motion for new trial shows that the original petition contained such averments as would make such evidence as that claimed to be newly discovered not only proper, but necessary, on the trial.

Moreover, the answer alleged "that such wheat was worth on the Sherman market, at the time defendants refused it, eighty cents per bushel, and plaintiffs, by the use of reason-

able diligence, could have obtained that price for it, instead of sending it at such great expense to a distant market, where the price was less."

This answer shows that appellants were fully aware that they needed just such evidence as they claim to have discovered after trial to meet the case made by appellees' pleadings, and the motion for new trial fails to show that any effort was made to obtain it.

The court did not err in overruling the motion for new trial, and its judgment will be affirmed.

SALES — RIGHT OF SELLER TO RESELL. — The buyer's refusal to take goods entitles the seller to resell upon giving of notice to the buyer: *Gilly v. Henry*, 8 Mart. (La.) 402; 13 Am. Dec. 291; *Coffman v. Hampton*, 2 Watts & S. 377; 37 Am. Dec. 511; *Patten's Appeal*, 45 Pa. St. 151; 84 Am. Dec. 479. The seller must, upon the resale, obtain the highest price he can: *Rosenbawm v. Wooden*, 18 Gratt. 785; 98 Am. Dec. 737. In *West v. Cunningham*, 9 Port. 104, 33 Am. Dec. 300, and *Atwood v. Lucas*, 53 Me. 506, 89 Am. Dec. 713, it was decided that when a buyer refuses to fulfill his contract, the seller may resell the goods without giving any notice to him. In *Roelings v. Lock &c. Co.*, 130 Ill. 661, the rule is laid down that where a buyer refuses to take and pay for goods, the seller may resell them, and charge the vendee with the difference between the contract price and that realized at the resale; but the resale must be fair, and made in the manner best calculated to obtain the highest price for the goods.

MISSOURI PACIFIC RAILWAY COMPANY v. WHIPSKER.

[77 TEXAS, 14.]

* **GARNISHMENT OF EXEMPT WAGES.** — A garnishee who is indebted to a defendant for wages which by law are exempt from execution is not protected by a judgment against him, when he fails to state in his answer the facts which show the exemption, and when the debtor has not been formally cited to appear, and has not voluntarily appeared for the purpose of maintaining his right.

GARNISHMENT OF EXEMPT WAGES — NOTICE. — A debtor is not considered to have constructive notice of a garnishment proceeding to subject his exempt wages to the payment of a claim, and in such case it is the proper practice for the garnishee, after disclosing the facts which show the exemption, to have the debtor cited, to the end that he may make his own defense.

Carr and Lewis, for the plaintiff in error.

T. G. Pray, for the defendant in error.

GAINES, A. J. This suit was brought by the defendant in error against plaintiff in error to recover a balance due him for services as a brakeman. The defendant company answered,

among other things, that in a certain suit in which this plaintiff was defendant, a writ of garnishment had been served upon it, and that upon the coming in of its answer, a judgment had been rendered against it, which it had paid. A transcript of the proceedings in the garnishment suit was introduced in evidence by the defendant upon the trial: They showed that the defendant company answered that it was indebted to this plaintiff, but did not show that the answer disclosed that the indebtedness was for current wages. The court held that the judgment in the garnishment proceedings, and its payment by the defendant company, did not diminish the liability of the company to the plaintiff in this suit, and gave judgment accordingly. The ruling of the court in that particular is here assigned as error.

Our statutes provide "that no current wages for personal service shall be subject to garnishment, and where it appears upon the trial that the garnishee is indebted to the defendant for such current wages, the garnishee shall nevertheless be discharged as to such indebtedness": R. S., art. 218. The question then is, Will the garnishee who is indebted to the defendant in the suit for current wages be protected by a judgment against him when he fails to state in his answer the facts which show the exemption? We think this question must be answered in the negative. The garnishment proceeding is ancillary to the main suit, and to it the defendant in the principal action is not a party. He is not required to be served with notice of either the issuing or the service of the writ of garnishment. It is true that our statutes, literally construed, require the garnishee to answer only whether or not he is indebted to defendant, and whether or not he has any effects of the defendant in his possession, and does not, in terms, direct that he shall say whether such indebtedness or such effects are exempt from a forced appropriation to the payment of debts or not: R. S., arts. 188, 199. The statutes of some of the states require him to answer only as to debts or property not exempt. We think, however, that since the defendant is not required by the statute to have notice of the service of the writ, that it was not intended that the garnishee should, in his answer, confine himself to the literal directions of the statute when he knows that the debt or property is exempt. Such a rule would place it in the power of the garnishee in many cases to deprive the defendant of the exemption which the law affords him. The garnishment may issue after judgment;

and even when it is issued before, the defendant may remain ignorant of the fact unless he sees proper to defend the principal suit. If after service of citation he determines not to defend, he may expect a judgment to be rendered against him and execution to issue; but we know of no rule which requires him to take notice of any ancillary proceedings. If he fails to appear, and the plaintiff amends the statement of his demand so as to show a cause of action materially different, he must have notice. For this reason we cannot think that it was the intention of the legislature that he should be concluded by the judgment in the garnishment proceeding, when the garnishee has failed to disclose the facts showing the exemption, and when he has not been formally cited to appear and has not voluntarily appeared for the purpose of maintaining his right.

This ruling we think in accordance with the great weight of authority in the courts of other states. The statute of Maine provides "that no person shall be adjudged trustee by reason of any amount due from him to the principal defendant as wages for his personal labor for a term not exceeding one month." In construing that statute, the supreme court of that state says: "The statute secures to the laborer his claim of payment for one month's labor, and places it beyond the reach of his creditors, and his debtor cannot deprive him of it by his neglect to disclose the whole matter when summoned as his trustee": *Lock v. Johnson*, 36 Me. 464. The following authorities are to the same effect: *Chicago etc. R. R. Co. v. Ragland*, 84 Ill. 875; *Winterfield v. Milwaukee etc. R'y Co.*, 29 Wis. 589; *Daniels v. Marr*, 75 Me. 397; *Jones v. Tracy*, 75 Pa. St. 417.

The case before us illustrates the injustice of a contrary doctrine. The suit in which the writ of garnishment was sued out was brought June 25, 1886, in a justice court of Williamson County. The writ of garnishment was issued, was served, and was answered by the garnishee on the same day the suit was instituted. The citation for the defendant to Williamson County was returned not found, when an *alias* issued to Bexar County, and was served upon him. He made default. There is nothing in the record to indicate that he ever had any reason to suspect that a garnishment had issued to subject his wages to the payment of the debt.

In saying that the defendant in the principal suit is not a party to the garnishment proceeding, we do not wish to be understood as holding that he has not the right to appear in

a case like this, and to make his own defense. On the contrary, our statutes expressly permit this: R. S., art. 212. What we do mean to say is, that he is not to be held to have constructive notice of the garnishment proceeding.

We will say, in addition, that in every case of this character it would be a proper practice for the garnishee, after disclosing the facts which show the exemption, to have the defendant cited, to the end that he should make his own defense: *Iglehart v. Moore*, 21 Tex. 501. The parties at interest will then have the burden of the litigation, and upon the trial the garnishee will be entitled to recover his costs, and a reasonable attorney fee for his answer. This certainly should be the practice when the fact of the exemption is contested by the plaintiff, or when the garnishee is in doubt as to the facts. Such a rule affords ample protection to all parties.

The judgment is affirmed.

GARNISHMENT — DEFENSES AVAILABLE TO GARNISHEE. — Where an employer is sought to be held as a garnishee for wages due to his employee, he should set up in his answer that such wages are exempt: *Terre Haute etc. R'y Co. v. Baker*, 122 Ind. 433; note to *Lathrop v. Clapp*, 100 Am. Dec. 511, 512; note to *Hanna v. Lauring*, 13 Am. Dec. 341; *Union P. R'y Co. v. Smerch*, 12 Neb. 751; 3 Am. St. Rep. 290. In Alabama, where a claim of exemption is made to money in the garnishee's hands, the claim must be accompanied with the statutory inventory of the debtor's property: *Tonsmire v. Buckland*, 63 Ala. 312. But an employer need not defend for an employee in a proceeding by garnishment against him in another state, and failing to do so does not render him liable to such employee for wages in his hands: *Chicago etc. R. R. Co. v. Meyer*, 117 Ind. 563. See, however, *Missouri P. R'y Co. v. Sharitt*, ante, p. 143, and note. The garnishee, knowing that the debt has been assigned, must plead the fact in his answer: *Phipps v. Riley*, 15 Or. 494; or he may plead in his answer that the debt sought to be garnished in his hands was made by the judgment debtor as the agent of his wife, whereby the money is due not to him, but to the wife: *Seward v. Arms*, 145 Mass. 196; or he may avail himself of any defects in the proceedings which tend to render the judgment invalid as against the judgment debtor: *Strvinguth v. Reigelman*, 75 Wis. 212. The garnishee's answer, simply denying, *in hæc verba*, the allegations in the complaint, raises no issue, and is insufficient: *Dawson v. Maria*, 15 Or. 556; and when judgment has been rendered against a garnishee whose answer was insufficient, the fact that a good defense existed is immaterial, if, without fault of the complainant, it was not made in the proper time and manner: *Mellon v. Lewis*, 74 Tex. 411. Still, a garnishee can never be bound, unless it is shown that at the date of the garnishment the judgment debtor had a cause of action against him for a debt due or to become due: *Edney v. Willis*, 23 Neb. 56. Compare note to *Sessions v. Stevens*, 46 Am. Dec. 342, 343.

GARNISHMENT. — In garnishment proceedings, the judgment debtors must all be notified; for in the absence thereof, they cannot be bound: *Hamilton v. Rogers*, 67 Mich. 135; *Union P. R'y Co. v. Smerch*, 22 Neb. 751; 3 Am. St. Rep. 290.

GAINESVILLE NATIONAL BANK v. BAMBERGER,
BLOOM, & Co.

[77 TEXAS, 43.]

SALES — DECLARATION OF MATERIAL FACT. — A false representation as to his financial *status*, made by a person to a commercial agency, with a view to obtaining credit, is a declaration of a material fact, and not the mere expression of an opinion.

SALES, CANCELLATION OF, FOR FALSE REPRESENTATIONS. — Misrepresentations made by one person, not with a view of reaching another, are not available to one who may have acted upon them, to cancel a sale made by reason thereof, but a third person, to whom they were not directly made, can cancel a sale made by him, when the representations were made with direct intent that he should act upon them in the manner which occasioned the injury.

SALES, CANCELLATION OF, FOR FALSE REPRESENTATIONS. — It is not essential to the cancellation of a sale that false representations should be addressed to the party directly who seeks a remedy for having been deceived and defrauded by means thereof. If they were false, and so known to be by the party making them, and were made with intent that they should be communicated to and believed by others interested in ascertaining the pecuniary responsibility of the buyer, and with intent to procure credit and defraud sellers, and were relied upon by the seller, and the sale procured thereby, he is entitled to rescind.

SALES, CANCELLATION OF, FOR FALSE REPRESENTATIONS TO COMMERCIAL AGENCY. — Where a person, for the purpose of obtaining credit, makes false statements to a commercial agency as to his financial *status*, expecting them to be acted upon, and effects a purchase by such means, the seller may, upon discovering the fraud, cancel the sale and reclaim his goods, even as against other attachment creditors of the buyer.

Potter, Potter, and Eddleman, for the appellants.

Lanius and McCans, and Stuart, Bailey, and Harris, for the appellees.

HOBBY, J. Two well-defined issues were submitted and litigated in this action of the trial of the right of property.

The appellees, Bamberger, Bloom, & Co., who were claimants of the property attached by appellants, contend, first, that in the spring of 1887, Goldstein and Melasky, who were the defendants in attachment, purchased the goods in controversy from them, and that the sale was made by them upon the faith of the representations of said Goldstein and Melasky as to their financial standing and solvency, communicated to Dun's Mercantile Agency, of New York, in August, 1886; that appellees were subscribers to said agency and relied upon said representations, and save for them they would not have sold the goods; that the representations were false, and so known to be when made. It was contended, in the second

place, that the goods were purchased at a time when the purchasers knew that they were insolvent and unable to pay for the same, and that they did not intend at the time of the purchase to pay for them.

To this it is urged, in reply by appellants, that if a statement made to said agency can be construed to be a representation to a subscriber, it should be shown that the party making such statement knew of the subscriber, and made the representations with a view of influencing such subscriber. And further, that the representations referred to were but matters of opinion, and not the statement of facts, and that they should be made during the negotiation regarding the trade, or so connected therewith as to constitute a part of the transaction.

The facts upon which the appellees rely in this case as establishing the existence of fraud are: That in July, 1885, the firm of Goldstein and Melasky, then engaged in business in Gainesville, Texas, made a statement through Melasky, a member of the firm, to Dun's Commercial Agency, to the effect that he brought into the firm seventeen thousand dollars; that there was stock on hand to the amount of twenty thousand dollars, and eleven thousand dollars in accounts. The indebtedness of the firm was represented to be about seventeen thousand dollars, which included a private debt of two thousand dollars, their assets above liabilities showing, by this statement, thirty-one thousand dollars. About a year subsequent to the above, in August, 1886, another statement is made by Melasky to said agency, in which he represented that there was then \$45,530 in stock, and \$29,670 in notes and open accounts which were good, two dwellings in Gainesville worth \$10,000, and 113 acres of improved land, valued at \$10,000, constituting the assets. Their liabilities were represented to be about \$28,973, leaving an excess of assets amounting to \$66,227. Statements, it seems, were made annually to this agency, purporting to show the financial *status* of Goldstein and Melasky.

It further appears from the testimony that in August, 1886, Melasky called at the commercial agency of Dun, in New York, to explain a discrepancy in the former statement. This explanation is, that the statement made by him in July, 1885, did not embrace his "personal real estate" of twenty thousand dollars and the net profits of the business of the preceding year, amounting to fifteen thousand dollars, which items, added to the thirty-one thousand dollars, shown by his

July, 1885, statement as the assets of the firm, would make the present surplus of sixty-six thousand dollars above their liabilities.

Such were the representations made as to the financial status and the solvency of the firm of Goldstein and Melasky, upon which the proof shows the appellees relied in making the sale of the goods involved in this trial, and without which they would not have sold them. The testimony of Melasky is to the effect that he made these statements to the commercial agency of Dun for the purpose of obtaining credit, and that he knew at the time that these facts would be communicated to the subscribers of said agency; and appellees were subscribers to this agency, from which they derived, to a great extent, their information of the financial standing of the former.

It is not necessary to reproduce in detail the estimates and calculations in evidence which authorized the conclusion by the court of the falsity of the representations above mentioned.

Melasky's evidence discloses the fact that when he was in New York, in the spring and summer of 1887, his firm was so pressed for money that he resorted to the process of "kiting," and which is not considered fair financial dealing among merchants. It consisted of his drawing drafts on his Texas house for money to pay drafts in New York, and his Texas house would pay the drafts by drawing on him in New York, he having no money in New York, and his house in Texas being similarly situated. It was shown that about the time of the purchase of the goods, the liabilities of Goldstein and Melasky were about seventy-eight thousand dollars and their assets about seventy-two thousand dollars. The dwelling-houses included in the statements made to the agency were not subject to execution.

In the year 1887 it was proved that the firm was largely indebted to appellants, and rendered a statement showing their liabilities to be about thirty thousand dollars less than their assets, upon the faith of which the bank loaned them money. That was eight or nine months subsequent to their report to the agency showing a surplus of sixty-six thousand dollars. This statement to the bank, it was testified by the president, was untrue. In the preceding fall, 1886, a statement by Melasky to a Baltimore commercial agency showed their assets to be between twenty thousand and thirty thousand dollars. In the summer of 1887 the stock of the firm was found

to be twenty thousand dollars short, but no explanation was made of how that occurred.

The evidence plainly shows that but for the representations made by Melasky the contract of sale would not have been consummated, and there is nothing in the proof which would justify the inference that the sale of the goods would have been made by appellees without these representations, upon which they relied. It follows, therefore, necessarily, that such being the effect of the statements made to the agency, they were material: *McAlee v. Horsey*, 35 Md. 439-452. The law governing the sale of personal property is well established to the effect that the mere expression of an opinion as to values, which proves to be incorrect or false, does not come within the rule applicable to the fraudulent representation of a material fact. But the *status* of the debtor is a fact, and a representation as to that *status* is the declaration of a fact: Benjamin on Sales, 562, note. In *Bradley v. Luce*, 99 Ill. 234, worthless stock was represented as worth a large sum, and mortgages for twelve thousand dollars on land worth two thousand dollars were represented as good. These statements were held clearly fraudulent.

No inflexible rule can with accuracy define all of the circumstances in which the representations of fact or of matters of opinion may become fraudulent: Benjamin on Sales, 562, note.

But representations of the financial *status* and solvency of Goldstein and Melasky, under the circumstances in this case, were clearly statements of fact, and not mere expressions of opinion.

It is not essential that the misrepresentations should have been directly made to the appellees by Goldstein and Melasky, and during the negotiations regarding the contract of sale, for them to avail in canceling such contract.

As a general proposition, it may be correct, as contended by appellants, that a misrepresentation made to one person, not with a view of reaching another, cannot be available to another, who may have acted on it to cancel a contract entered into by reason of it; but it is sound doctrine that a third person, to whom they were not directly made, can maintain an action of deceit, and seek the cancellation of a contract made by him, if it appear that the defendant's false representations were made with a direct intent that he should act upon them in the manner which occasioned the injury: *Eaton v. Avery*, 83 N. Y. 81.

If the false representations be made with a view of reaching the third person to whom it is repeated, and for the purpose of influencing him, they will afford a cause of action: 1 Pomeroy's Eq. Jur., sec. 879.

An illustration identical with this phase of the case will be found in the case of *Eaton v. Avery*, 83 N. Y. 31. The representations charged in the case cited, as in this case, were not made to the appellee directly, but to the Dun commercial agency, and by it communicated to appellees, who sold the goods, relying upon the statements so made.

It was in that case contended, as in this, that assuming the representations to have been false, they were not sufficiently connected with the contract of sale.

It was there held that it was not essential that the representations should be addressed to the party directly who seeks a remedy for having been deceived and defrauded by means thereof; that if they were false, and so known to be by the party making them, and were made with the intent that they should be communicated to and believed by persons interested in ascertaining the pecuniary responsibility of the firm, and with the intent to procure credit and defraud such persons thereby, and they were relied on by the seller and the sale procured thereby, the plaintiff was entitled to recover.

In the case last cited it was said: "A person furnishing information to such agency in relation to his own circumstances, means, and pecuniary responsibility can have no other motive in so doing than to enable the agency to communicate such information to persons who may be interested in obtaining it for their guidance in giving credit to the party; and if a merchant furnishes such an agency a willfully false statement of his circumstances or pecuniary ability, with the intent to obtain a standing and credit to which he knows he is not justly entitled, and thus to defraud whoever may resort to the agency, and in reliance upon the false information there lodged, extend a credit to him, there is no reason why his liability to any party defrauded by those means should not be the same as if he had made the false representation directly to the party injured."

Upon the other branch of the case, — the known insolvency of Goldstein and Melasky at the time of the purchase of the goods, and their alleged intention not to pay for them, — it is only necessary to say of it that it is a question of fact to be found from all the circumstances developed by the proof,

which proof in this case we are not prepared to say was not sufficient to support the decree, if the sufficiency of the proof upon either of the issues we have discussed is contested by appellant, which we do not understand to be done in this case.

"The mere insolvency of the purchaser, where no fraudulent purpose exists, as also the mere fact that the purchaser has knowledge that his debts exceed his assets, though the fact be unknown and uncommunicated to the vendor, will not vitiate the purchase," is certainly true.

So, on the other hand, "an intention on the part of the purchaser not to pay for the goods, existing at the time of the purchase, and concealed from the vendor, is such a fraud as will vitiate the contract": *Talcott v. Henderson*, 31 Ohio St. 164; 27 Am. Rep. 501.

There is no error in the judgment, and we think it should be affirmed.

SALES, CANCELLATION OF, FOR FRAUD IN PURCHASE ON CREDIT.—See monographic note to *Reid v. Cowdroy*, 18 Am. St. Rep. 362-365, in which it is stated that "a person furnishing false information to a mercantile agency, to be communicated to persons who may be interested in obtaining it for guidance in giving credit to such person, is as much liable to the person thereby defrauded as if he made false representations directly to the party injured," citing, among other authorities, the principal case.

Where goods are obtained on credit through false representations of the purchaser, it avails nothing that he expected to be able to pay for them, and had no intention of defrauding the seller out of his money: *Judd v. Weber*, 55 Conn. 267; and the purchaser's assignee for the benefit of creditors cannot hold the goods as against the seller: *Singer v. Schilling*, 74 Wis. 369.

O'NEAL v. CITY OF SHERMAN.

[77 TEXAS, 123.]

DEDICATION OF STREET, EFFECT OF.—When a street is dedicated to the public, the fee vests in the public only when the statute so provides; in all other cases the owner of the land retains his exclusive right in the soil for every purpose of use or profit not inconsistent with the public easement, and may maintain appropriate actions for any encroachments upon it.

EMINENT DOMAIN.—LAND CONDEMNED AND TAKEN FOR SPECIAL PURPOSES, on the score of public utility, is limited to such purposes, and cannot be appropriated to another use, to the detriment of the owner of the fee.

DEDICATION OF STREET—RIGHT TO LIMIT USE.—A grantor may prescribe the conditions, qualifications, and limitations of a grant of property to

a municipal corporation, and when the land is granted for "street purposes only," the city cannot appropriate it to another use, or if it does, the use may be enjoined.

Hare, Edmonson, and Hare, for the appellants.

HOBBS, J. Appellants, who are husband and wife, sought to enjoin the city of Sherman, incorporated under the general incorporation act, and W. C. Connor and others who had contracted to furnish said city a system of water-works, from bearing a large number of wells upon a certain strip of land fifty feet wide and about one thousand feet long, which appellants had conveyed off their homestead to the said city a few days before "for street purposes, and none other," the deed expressly stipulating that the same rights, and no higher, should pass to the city than would have been acquired had the city procured the condemnation of said strip for street purposes alone, the consideration paid being \$550. Appellants alleged in their petition that, believing that the city of Sherman had no use for this property as a street, and that the city council desired it only for the purpose of turning the same over to the water-works contractors, they had refused to deed the same to the city, except upon payment of a large sum, amounting to — thousand dollars; that subsequently they were informed by the mayor of said city, and by at least one of the aldermen thereof, that as a matter of fact it was untrue that the said city had bound itself to permit the contractors to sink wells upon the said strip, and believing such representations to be true, the deed was executed upon receipt of the said sum of \$550; that said deed would not have been executed had complainants known, what has since been ascertained to be true, that the city's only object for acquiring the said land was to deliver the same to the water-works contractors, to be used for water purposes as contradistinguished from street purposes.

That if, as a matter of law, the execution of said deed has conferred upon the city the right to use said land for water purposes, they prayed that said deed be canceled or reformed, because, they charge, that they were induced to execute the said deed by the fraudulent representations of the city's officers; that the said city had not agreed with or promised to give the water-works contractor permission to sink wells upon said lands, when, as a matter of fact, it had been fully understood all the while between the said contractor and the mayor

and city council of said city that such right would be guaranteed to said contractors so soon as the city should acquire an interest in said lands by condemnation or otherwise; that they were led, by the fraudulent representations and the concealment of their true intentions on the part of said officers, to believe that the said officers had made no promise to the said contractor, and would attempt to confer no rights upon him, but would leave all future controversy over the right to use said lands for the purpose of sinking wells thereon to be settled by complainants and the contractor, without any interference on the part of the city.

That immediately after the execution of said deed the water-works contractors, with the full knowledge, approval, and consent of the city, began to sink a large number of wells upon the said strip of land, and are making preparations to attach to said wells the powerful water-works machinery, which will exhaust not only the water underlying said strip, but the water underlying complainant's adjacent lands; that complainant's home place is valuable to them, and was acquired chiefly on account of the fine water supply underlying the same, which said water supply has yielded them for many years an annual income varying from five hundred to at least two thousand dollars.

There was a prayer for injunction. The petition was filed March 18, 1887, and on the 23d of March, 1887, the injunction was refused in chambers, the cause standing over for trial.

On December 16, 1887, general demurrers were filed by the several defendants. On the same day said demurrers were sustained by the court, and plaintiffs having declined to amend, their suit was dismissed, to which ruling they excepted, and in open court gave notice of appeal to the supreme court.

The only error assigned is the action of the court in sustaining the general demurrer to the petition, and in dismissing the suit, because the petition set up a good cause of action. Under this assignment, it is urged that "the estate or interest taken by condemnation proceedings is only an easement, and not the fee, unless the statute plainly contemplates and provides for the appropriation of the fee; and this is true, even though the statute makes no provision for a deduction in the assessment of damages for the reversionary right. It is also a fundamental rule that all statutes in regard to eminent domain are to be given a very strict construction.

"Where the street is given to the public by dedication, as by filing for record a plat, the fee is in the public only when made so by statute; and where it is in the former owner, he may maintain an action for any improper use of such street.

"The owner of land dedicated retains his exclusive right in the soil for every purpose of use or profit not inconsistent with the public easement, and may maintain appropriate actions for any encroachments upon it."

In cases where land is condemned for a special purpose on the score of public utility, the sequestration of the land is limited to that particular use. The reason is, that as the property itself is not taken, but the use only seized, the right of the public is confined to that use of which alone the owner has been divested: *Imlay v. Union Br. R. R. Co.*, 26 Conn. 255; 68 Am. Dec. 392.

This principle is recognized in *State v. Laverack*, 34 N. J. L. 201, *St. Paul etc. R. R. Co. v. Shurmeier*, 7 Wall. 272. So, too, where the use to which the dedicated property is put is wholly different from the original purpose, a new assessment was required to give validity to the appropriation; and where lands appropriated by a railroad company for its purpose, and afterwards were leased for private occupation, it was held that the owner of the fee was entitled to recover damages: *Locks v. Nashua etc. R. R. Co.*, 104 Mass. 1.

The rule that land taken by the public for a certain use cannot be appropriated to another use, to the detriment of the owner, affords the only adequate protection of the citizen's constitutional right to be compensated for the condemnation or use of his property for the public benefit.

In the case under consideration, it would seem to be unnecessary to discuss the rights of the parties, where the acquisition of the land was by the exercise of the right of eminent domain. As the rights of the appellee arise out of and are derived from a grant or conveyance by the appellants, their rights therefore should be tested by the terms of that instrument, in so far as they are disclosed by the petition.

The right of the plaintiffs (appellants) to prescribe the conditions and qualifications of a grant of property to a municipal corporation is unquestioned, and is recognized by its acceptance of the grant.

The city no doubt possessed the authority, under the deed, to sink wells and obtain water for the supply of its fire department in suppressing conflagrations, and also for sanitary

or any legitimate purposes incident to the use for which the land was conveyed.

It plainly appears from the petition that the land was conveyed for "street purposes only," and it was stipulated that the same and no higher rights should pass to the city than could have been acquired by that city in the condemnation of the land for "street purposes only." This limitation is without ambiguity, and the legal effect of its acquisition in this mode for street purposes we have seen. The legal effect of its acquisition by grant for street purposes is well settled. In *Dubuque v. Benson*, 23 Iowa, 250, it was held by Judge Dillon that the effect of a conveyance (similar to that in this case) to the city of Dubuque was to give the right or easement of passage in the streets; the right to use and work them as public ways, and the like; but reserved all other rights,—in the case cited, the right to take minerals therefrom.

We do not think that the deed in this case, dedicating the land to the city for "street purposes only," authorized the use to which the petition alleges it was appropriated by the city.

The remaining proposition, that the deed having been procured by false and fraudulent representations, it should therefore be reformed or canceled, we do not think it necessary to consider, in view of the disposition made of the preceding propositions.

We think the court erred in sustaining the demurrer and in dismissing the suit, and that the judgment should be reversed and the cause remanded.

DEDICATION OF STREETS. — The fee does not pass by the dedication of land to public use, but only such interest as the purposes of the dedication require: Note to *Schurmeier v. St. Paul etc. R. R. Co.*, 88 Am. Dec. 67; note to *Gardiner v. Tiedale*, 60 Am. Dec. 422, 423; *Schneider v. Jacob*, 86 Ky. 101. The land-owner retains the right to use the land for any lawful purpose compatible with the purposes for which the dedication was made: *Hillworth v. Lord*, 40 Minn. 337; and may attach such reasonable restrictions to the use of the land as he may desire: *Church v. Portland*, 18 Or. 73.

BERRY BROTHERS v. DAVIS & Co.

[77 TEXAS, 191.]

GARNISHMENT OF NON-RESIDENT. — A resident indebted to a non-resident may be garnished in the courts of the state of the former's residence, and judgment there legally rendered against him that will bind the fund in his hands, although his non-resident creditor was cited to appear only by publication. Payment by the garnishee under such judgment is conclusive against such creditor.

ACTIONS — COSTS. — Where tender is not made until after suit, defendant is liable for costs accruing prior to the tender.

GARNISHEE WHO HAS PAID A JUDGMENT rendered against him is liable to his creditor for interest on the remainder of the debt from the date of the judgment in garnishment.

GARNISHEE WHO PERMITS COSTS to accumulate upon judgment against him cannot charge his creditor with such costs.

Peeler and Peeler, for the appellants.

Sheeks and Sheeks, for the appellees.

STAYTON, C. J. Appellees were indebted to appellants in the sum of \$266.80 for merchandise, which was due on December 8, 1888.

On October 13, 1888, Heidenheimer & Co. brought suit against appellants in justice court in Galveston County to recover \$168.65, claimed to be due from them.

In that proceeding a writ of garnishment was sued out and served on appellees, on which they answered that they were indebted to appellants as claimed in this action.

Appellants were residents and citizens of the state of Virginia, but appellees, as well as Heidenheimer & Co., were residents of Texas.

Appellees having answered as stated, and appellants having been cited by publication, on March 18, 1889, a judgment was rendered in favor of Heidenheimer & Co., against appellees, as garnishees, for \$174.75 and costs of suit, all of which aggregated \$193.40.

Execution issued on that judgment, and to satisfy it, appellees, on April 5, 1889, paid \$210.70, which included judgment, interest, and costs.

Appellants were not cited to answer in the suit brought against them by Heidenheimer & Co., otherwise than by publication, and did not appear.

This action was brought by appellants to recover from appellees the value of the merchandise sold, with interest from Jan-

uary 1, 1889, as though no part of it had been paid under the proceedings in garnishment referred to.

In their pleadings, appellees set up the matters referred to in defense so far of the action, but admitted a balance of \$64.40 to be due, and this tendered. A judgment was rendered in favor of appellants for \$56.10, and for \$10.85 as costs, but all other costs were adjudged against them.

It is admitted that the proceedings in garnishment were regular, but it is stated that the claim of Heidenheimer & Co. was an unliquidated demand.

There is no claim, however, that the debt which they sought to recover was not of such a character as to make attachment or garnishment proper writs for its enforcement.

It is claimed, however, that on service by publication only, the court had not jurisdiction to render a judgment in favor of Heidenheimer & Co., or against the garnishees.

The court below held that the proceeding in garnishment was in the nature of a proceeding *in rem*, which gave the court jurisdiction to render a judgment against appellants and the garnishees disposing of the fund in the hands of the latter, and in this we think there was no error.

Appellees were residents of this state and indebted to appellants, and in such cases it is held that by garnishment on the debtor, judgment may be legally rendered against him that will bind the fund in his hands, although his creditor was a resident of another state, and not cited otherwise than by publication.

The following cases will illustrate the application of the rule: *Brashear v. West*, 7 Pet. 620; *Mattingly v. Boyd*, 20 How. 128; *Sawyer v. Thompson*, 24 N. H. 510; *Young v. Rosa*, 31 N. H. 201; *Tingley v. Bateman*, 10 Mass. 345; *Nys v. Liscombe*, 21 Pick. 264; *Erskine v. Staley*, 12 Leigh, 406; *Lovejoy v. Albee*, 33 Me. 417; 54 Am. Dec. 630; *Wheat v. Platte City etc. R. R. Co.*, 4 Kan. 370; *Jones v. Comings*, 6 N. H. 498; *Lawrence v. Smith*, 45 N. H. 538; 86 Am. Dec. 183; *Baxter v. Vincent*, 6 Vt. 614; *Cronin v. Foster*, 13 B. I. 196.

The rule was recognized in *Haggerty v. Ward*, 25 Tex. 144. In that case, however, the plaintiff and defendant were both non-residents of the state, and there was no answer by the garnishee showing indebtedness or other fact that would fix liability on him. Service on the defendant was only by publication, and *scire facias* to the garnishee was served in the same manner; and under that state of facts it was held that

the court had not acquired jurisdiction to enter a judgment against the defendant, subjecting anything that may have been in the hands of the garnishee to payment of the debt.

In the case before us, the garnishees were duly cited, resided in this state, and had answered, showing their indebtedness to appellants in a sum larger than necessary to satisfy the claim of Heidenheimer & Co. before judgment was rendered in favor of the latter.

Appellees having admitted an indebtedness of \$64.40, and tendered this, we see no good reason why the court below rendered judgment for a less sum, or apportioned the costs. If the balance due appellants had been tendered before this action was brought, then appellees should have been relieved from costs, but as this was not done, they were liable for the costs of the suit. It is claimed that appellants were entitled to more than appellees admitted to be due, and this arises, perhaps, out of a claim for interest. The claim of appellants would have borne interest from January 1, 1889; appellees, however, would not be liable for interest after writ of garnishment was served upon them until judgment was rendered against them, for until that time they had no right to pay to either party.

When the writ of garnishment was served does not appear, but the inference from the record is, that it was served before the claim bore interest. From March 18, 1889, appellees could legally have paid to appellants the balance due them, and that ought to bear interest from that date.

If no interest had accrued when the writ of garnishment was served, that balance was \$73.40, less the costs of the garnishment proceeding, and for that sum, with interest at the rate of eight per cent per annum until judgment, appellants were entitled.

If appellees permitted costs to accumulate under the judgment rendered against them in favor of Heidenheimer & Co., they are not entitled to that in settlement with appellants.

The facts are not stated in the record which would enable this court to render a judgment such as should be, for it is evident that some costs accruing on the judgment in favor of Heidenheimer & Co. against appellees after its rendition must have been allowed to appellees.

The judgment will be reversed, and the cause remanded, when the court below will be able to ascertain the facts necessary to the rendition of a proper judgment.

GARNISHMENT OF NON-RESIDENTS. — A foreign corporation doing business in a state may be garnished for a debt due to a non-resident employee, contracted outside of the state, and exempt from garnishment in the state where the judgment debtor and the garnishee reside: *Burlington etc. R. R. Co. v. Thompson*, 31 Kan. 180; 47 Am. Rep. 497. Property of a non-resident in the hands of another may be reached by garnishment, the property and the garnishee being within the jurisdiction of the court: *Mohyneux v. Seymour*, 30 Ga. 440; 76 Am. Dec. 662; *Cousens v. Lovejoy*, 81 Me. 467. A garnishee in one state may be charged, even though the judgment creditor and judgment debtor both reside in another state, notwithstanding the latter has made an assignment for the benefit of his creditors in the latter state, no notice of which has been given to the garnishee: *Nichols v. Hooper*, 61 Vt. 295. To an action against a railway company to recover wages, an answer alleging that proceedings were instituted against plaintiff in another state, in which a judgment was rendered and defendant garnished, is sufficient, and the statutes authorizing such garnishment in the foreign state need not be set forth: *Terre Haute etc. R'y Co. v. Baker*, 122 Ind. 433. But a foreign corporation must be located in a state, to give a court jurisdiction over it for garnishment: *Kitelohn v. Fireman's Ins. Co.*, 65 Mich. 331.

WESTERN UNION TELEGRAPH COMPANY v. YOUNG.

[77 TEXAS, 245.]

TELEGRAPH COMPANIES—DUTY TO DELIVER MESSAGE. — When a telegraphic message is received and sent directed to one person in care of another, the liability of the company ends with the delivery of the message to the person in whose care it is directed.

Stemmons and Field, for the appellant.

GAINES, J. This action was brought by defendant in error to recover of plaintiff in error damages for an injury to the feelings of his wife, alleged to have resulted from the failure of the company to deliver to her a telegraphic message informing her that her mother was dying. It was claimed that by reason of the failure, the plaintiff's wife was deprived of the opportunity of attending her mother's funeral, and that she was thereby caused great mental distress.

The message was directed to "Mrs. N. Young, care of W. R. Henry & Co., Fort Scott, Kansas." The evidence showed that Mrs. Young did not receive the dispatch until it was too late for her to reach the place of her mother's death before the burial. But there was evidence to show that on the morning of the day it was received for transmission it was delivered to W. R. Henry, of the firm of W. R. Henry & Co., and that he declined to forward it, and handed it back to the messenger.

The court instructed the jury, in effect, that if the defendant's agent at Fort Scott tendered the message to W. R. Henry, and he declined to receive it, and gave the messenger such directions as would have enabled him to find plaintiff's wife by the exercise of reasonable diligence, then it was the duty of the agent to use such diligence to find and deliver the message to her. We think the court erred in giving this instruction. The liability of the company must be determined by the terms of its contract. Its obligation was not to deliver to W. R. Henry & Co. and to Mrs. Young, but to deliver to them as her agents, properly addressed to her, to be dealt with by them as they deemed best. The direction, "To Mrs. Young, care of W. R. Henry & Co.," has the same meaning and legal effect as it would have had if the direction had been "To W. R. Henry & Co., for Mrs. Young." The company contracted to deliver to W. R. Henry & Co. for the benefit of plaintiff's wife, and when they delivered to a member of that firm, their liability was at an end. The court should have so charged the jury.

The other questions presented by the brief of the plaintiff in error have been so frequently decided by this court adversely to its contention that they require no consideration.

For the error in the charge of the court which we have indicated, the judgment is reversed, and the cause remanded.

TELEGRAPH COMPANIES — DELIVERY OF DISPATCH. — A telegram may properly be left at the hotel where a man resides, when he himself cannot be found, and the failure of the hotel clerk to deliver it to the person to whom it is addressed does not render the telegraph company liable: *Western Union Tel. Co. v. Trissel*, 98 Ind. 566. So the company performs its duty by delivering a dispatch to the person's wife, when he cannot be found: *Gleason v. Telegraph Co.*, 24 Fed. Rep. 119.

WILLIAMS v. HAYNES.

[77 TEXAS, 283.]

JUDGMENT — COLLATERAL ATTACK. — A judgment of a court of competent jurisdiction cannot be collaterally impeached, unless the record shows affirmatively the want of jurisdiction.

JUDGMENTS — COLLATERAL ATTACK. — In a collateral attack on a judgment, evidence of fraud not found in the judgment roll will not be received to avoid the judgment, though the fraud was in obtaining jurisdiction.

TRESPASS to try title, and for damages. In May, 1882, plaintiff, Annie Williams, was the owner in fee of the land in

suit. In February, 1881, J. W. Williams and Annie Williams brought suit against one T. N. Moore on an account of \$128, and obtained judgment for the amount, with costs of suit. In the same case D. Allen and D. Maury were summoned as garnishees. Afterwards, judgments of dismissal with costs of suit were rendered in favor of the garnishees. In March, 1882, executions were regularly issued on each of such judgments for costs therein, and after regular proceedings, the land in suit was sold, and the defendant claims title under such sale. Annie Williams, the plaintiff, had no notice of any of the said suits, although they all recite that she appeared. The court below decided that such judgments, and the sales thereunder, were not open to collateral attack in this action, and rendered judgment for defendant. Plaintiff appealed.

D. K. Fooshee, for the appellant.

Hale and Hale, for the appellee.

COLLARD, J. The law, as it has been announced in numerous decisions in this state, is against the claim set up by appellant.

It is settled that a judgment of a court of competent jurisdiction cannot be collaterally impeached unless the record affirmatively shows the want of jurisdiction. Even where a part of the record — the citation and its return — shows that service could not have been had, the judgment of a justice of the peace reciting that the defendant wholly made default, and that he "was duly served with process," was held not impeached. The judgment being the final act of the court, its judicial finding imports absolute verity. Evidence of fraud *aliunde* the record cannot be heard to dispute the judgment, even where the fraud is in obtaining jurisdiction. The following are some of the cases decided in this state holding the foregoing doctrines: *Murchison v. White*, 54 Tex. 78; *Fleming v. Seeligson*, 57 Tex. 524; *Odle v. Frost*, 59 Tex. 684; *Watkins v. Davis*, 61 Tex. 414; *Mikeska v. Blum*, 63 Tex. 44; *Treadway v. Eastburn*, 57 Tex. 209; *Long v. Browneman*, 59 Tex. 210. There are many other cases more or less in point, which we need not cite.

Treadway v. Eastburn, 57 Tex. 209, extends the doctrine to the limit that where the judgment recites that the party was served, the fact cannot be disputed by the return of the

citation. This case was followed by the commission of appeals in *Davis v. Robinson*, 70 Tex. 394. The doctrine is not singular: Freeman on Judgments, sec. 132.

We have been cited by appellant to the case of *Glass v. Smith*, 66 Tex. 549, as holding a contrary doctrine. Smith recovered judgment in a justice court for a yoke of oxen, in which Glass, the defendant, acquiesced. "Some person, without authority from Glass, without his knowledge, and contrary to his wish, but in his name," took the case to the district court by *certiorari*, where, Glass failing to appear, judgment was entered against him by default for the oxen, and on his failure to return them, for their value, fifty dollars.

Execution was issued and levied on land in another county, which was sold; then another execution was issued and levied on personal effects of Glass, who sued out an injunction to restrain the enforcement of the judgment. It was shown that Glass was authorized to believe that no adjudication would be had on the proceeding. The injunction was dissolved, and on appeal it was perpetuated, the court holding that the court not having jurisdiction of the person of Glass in the *certiorari*, the judgment was a nullity. For aught that appears in the record, there was no occasion to hold that the judgment was a nullity, to sustain the injunction restraining its collection, under the statute which requires such suits (on voidable judgments) to be brought within one year from the time of the rendition of the judgment, certain exceptions being named: Sayle's Civ. Stats., art. 2875, and note.

Our opinion is, the injunction was a direct proceeding between the original parties to vacate the judgment and forever prevent its enforcement, in which case the opinion would not be inconsistent with other cases cited, which refer only to collateral proceedings.

But be this as it may, the judgment enjoined did not recite any appearance for Glass. In the case before us, the judgments recite that plaintiff did appear, and that it was at her instance, and the instance of her co-plaintiff, that the suits were dismissed.

These judgments are controlled by the law as announced in *Treadway v. Eastburn*, 57 Tex. 209; they "import absolute verity," and are not subject to collateral attack. Many objections might be made to the principle by which we are controlled in making this decision; but it must be remembered that Mrs. Williams had the right to set aside these

judgments by direct proceeding. She has not availed herself of this privilege, preferring rather to treat the judgments as void,—a conclusion which the law will not sustain.

The judgment of the court below should be affirmed.

JUDGMENTS, COLLATERAL ATTACK UPON.—Collateral attacks upon judicial proceedings are not favored: *Wilkins v. Tourtellott*, 42 Kan. 176. A judgment against a defendant over whom the court had jurisdiction cannot be collaterally attacked, but is valid until reversed on appeal, or corrected in a direct proceeding, where there are irregularities or defects in it: *Lindsay v. Delano*, 78 Iowa, 350; *Spotts v. Commonwealth*, 85 Va. 531; *Lawson v. Moorman*, 85 Va. 880; *Boyer v. Berryman*, 123 Ind. 451; *Heffron v. Cunningham*, 76 Tex. 313; *McDonald v. Frost*, 99 Mo. 44; *Schee v. La Grange*, 78 Iowa, 101. For fraud, a judgment cannot be collaterally assailed: *Cicero Township v. Picken*, 122 Ind. 260; but must be attacked directly: *McClanahan v. West*, 100 Mo. 309. Only a judgment void on its face can be attacked, either directly or collaterally, without reference to lapse of time: *People v. Harrison*, 84 Cal. 607. On a collateral attack upon a judgment, the record only can be inspected, but on a direct attack, the true facts may be shown in contradiction of the record: *Lyons v. Roach*, 84 Cal. 28. Compare *Gould v. Sternburg*, 15 Am. St. Rep. 143; *Wilkerson v. Schoonmaker*, 77 Tex. 615; *post*, p. 803.

GULF, COLORADO, AND SANTA FE RAILWAY COMPANY v. McWHIRTER.

[77 TEXAS, 386.]

CONCURRENT NEGLIGENCE—LIABILITY OF EACH.—Where an accident occurs from two causes, each due to the negligence of different persons, but together the efficient cause, then all the persons whose acts contribute to the accident are liable for a resulting injury, and the negligence of one is no excuse for the negligence of the other.

NEGLECT IN LEAVING TURN-TABLE OPEN.—When a railway company leaves its turn-table unfastened, or so slightly fastened that children not *sui juris* can unfasten and use it, the company is liable for an injury resulting from its use by them. On account of want of intelligence on the part of the children, the negligence of the company is deemed the proximate cause of the injury.

CONCURRENT NEGLIGENCE—LEAVING TURN-TABLE OPEN.—Where a turn-table or other dangerous machinery, such as is likely to attract children to it for purposes of amusement, is left unfastened, this is negligence on the part of the owner; and if, while in such condition, it is put in motion by one of sufficient intelligence to make his act negligence, then both he and the owner are liable for their concurrent negligence, through which a child not *sui juris*, and hence not guilty of contributory negligence, is injured.

CONTRIBUTORY NEGLIGENCE OF CHILD.—In determining whether contributory negligence exists against a child, its intelligence must be considered; for the child's care must be measured by its intelligence, whether it is actor or sufferer.

Mathews and Wood, for the appellant.

W. B. Abney, for the appellee.

STAYTON, C. J. This action was instituted by Lewis McWhirter, a minor, by his next friend and father, J. C. McWhirter, against the Gulf, Colorado, and Santa Fé Railway Company, for the recovery of damages for injuries sustained by plaintiff while playing, with other children, on defendant's turn-table, in the city and county of Lampasas. The plaintiff alleges that defendant negligently permitted the turn-table to remain unguarded and unfastened; that it was a dangerous machine, and calculated to attract the attention of children; that plaintiff, then five years of age, and not knowing the danger thereof, went upon the turn-table, and while it was being revolved by other children, had his leg and hip caught therein, whereby he was seriously injured. The damages claimed were two thousand five hundred dollars.

Defendant filed its first amended answer, consisting of general and special exceptions, general denial, and also the following special defenses:—

1. The contributory negligence in plaintiff's parents, who, knowing the danger thereof, permitted plaintiff to play on the turn-table.

2. That plaintiff was induced and permitted to go on the turn-table by his older brothers and sisters, who were of sufficient age and intelligence to be responsible for their own negligent acts, and that the said older brothers and sisters of plaintiff caused the injury to plaintiff by putting the turn-table in motion, the said older brothers and sisters, at the time and place of the accident, having the charge, care, and custody of plaintiff.

3. That at the time of the accident, the plaintiff, and other older children, who were of sufficient age and intelligence to be responsible for their negligent acts, were playing on the turn-table, and such older children, knowing that plaintiff was so situated on the turn-table, and that if the same was revolved an injury to him would be certain, negligently caused said turn-table to be revolved, whereby plaintiff was injured, all of said children then being trespassers on defendant's property.

The cause was tried, and resulted in a verdict and judgment for plaintiff for the sum of \$1,233.33.

Henrietta McWhirter, a sister of plaintiff, who was the only

witness that testified in regard to the accident by which plaintiff was injured, testified as follows: "On March 10, 1886, when my brother Lewis McWhirter was hurt, he was about five years old. We were riding on the turn-table with some boys and girls; there were five or six of us; just as we stopped, the plaintiff tried to climb upon the turn-table, and some one gave it a push, and caught his leg between the turn-table and the ties, and mashed it. . . . I had played on the turn-table before; it was neither fastened, inclosed, nor guarded. We were in the habit of playing there. I was not on the turn-table when Lewis got hurt; I was close by at the time. I was then fourteen years old; Kate Bessonette, who was with us, was about my age; Bill Holder, who was there at the time of the accident, was about fifteen years old, and my brothers Willie and Jim, aged, respectively, ten and seven years, were there; Robert Gibson, aged about thirteen years, was there. The turn-table was just stopping when Lewis tried to get on it. I don't know which one of the boys pushed it. Will Holder was at the head of the turn-table, and he had just been pushing it; he and Bob Gibson had just been pushing it for us. It was one of them, or my little brother Willie, that pushed it. I was quite near to Lewis when he got hurt, — not over four or five feet. . . . Lewis could not move the table himself. My brother Willie could turn the table. Holder and Gibson came down while we were there. There was no grown person with us. Either of the other boys, except Lewis or Jimmie, could move the table alone."

The court, in its charge, made the liability of appellant to depend on the negligent condition in which its turn-table was kept, and no objection is made to the charge in this respect, nor claim that the turn-table was kept in proper condition.

It is claimed, however, that the court erred in giving the following charge: "If from the evidence you believe plaintiff was injured, but further believe that the same was caused by other parties than defendant's agents and employees revolving said table, and if you believe such other parties were of such age and intelligence as to know the danger of revolving such table, and of such age and intelligence as to be responsible for their own negligent acts, then if you so believe, you should find for defendant. But if you should believe from the evidence that such other parties were not of such age, discretion, and intelligence as to realize the danger of their acts and negligence in the transaction,

then the defendant would be responsible. . . . Whether or not the person who the proof may show revolved the table was of sufficient age, intelligence, and discretion to realize the danger of revolving the table, . . . you must determine from the evidence in the case."

It is contended that the court should have charged the jury that appellant was not liable if the turn-table was revolved by children over fourteen years of age, and that the question of intelligence and responsibility of such children should not have been left to the jury. It may be true that in the absence of evidence showing or tending to show want of ordinary capacity, that a court ought to assume a child over fourteen years of age to be *sui juris*, for at that age the law confers upon them some rights which require the exercise of an intelligent will and imposes on them liability for acts criminal in nature. It, however, does not follow from this that the giving of the charge would justify a reversal of the judgment.

Under the evidence and finding of the jury, it must be conceded that the negligence of appellant contributed to the injury, and if it be conceded that the person who put the turn-table in motion was *sui juris*, this would not relieve the appellant from liability, though another party might also be liable.

If an accident occurs from two causes, both due to negligence of different persons, but together the efficient cause, then all the persons whose acts contribute to the accident are liable for an injury resulting, and the negligence of one furnishes no excuse for the negligence of the other: *Markham v. Houston Nav. Co.*, 73 Tex. 247; *Illidge v. Goodwin*, 5 Car. & P. 190; *Webster v. Hudson Riv. R. R. Co.*, 38 N. Y. 260; *Slater v. Mercereau*, 64 N. Y. 138; *Martin v. North Star Iron Works*, 31 Minn. 410; *Minneapolis Mill Co. v. Wheeler*, 31 Minn. 121; *Arimond v. Green Bay etc. Canal Co.*, 35 Wis. 45; *Eaton v. Boston etc. R. R. Co.*, 11 Allen, 505; 87 Am. Dec. 730; Cooley on Torts, 823; Bishop on Non-contract Law, 518; Shearman and Redfield on Negligence, 35; Wharton on Negligence, 144; Thompson on Negligence, 1038.

The case of *Evansich v. G., C., & S. F. R'y Co.*, 61 Tex. 29, is cited for the proposition contended for by appellant and announced in the charge of the court. In that case the evidence tended to show that the turn-table was as well secured as its unfinished condition would permit, and it was held, if this was the case, that the unfastening and use of it by a per-

son *sui juris*, through which an injury resulted to a third person, would relieve the railroad company from liability. This was so because in that case the accident would result, not from the negligence of the company as a concurring cause, but from the intelligent and independent act of another. If a railway company should leave its turn-table unfastened or so slightly fastened that children not *sui juris* can unfasten it and use it, then it should be held liable for an injury resulting from its use by such persons, for on account of their want of intelligence, the negligence of the company must be deemed the proximate cause of the injury. If a turn-table or like dangerous machinery, such as is likely to attract children to it for purposes of amusement, be left unsecured, this is negligence on the part of its owner; and if while in this condition it be put in motion by one of sufficient intelligence to make his act negligence, then both parties ought to be held liable for their concurrent negligence through which one not guilty of contributory negligence is injured.

The general rule is, that infants are liable for torts committed by them, when intent with which the act is done is not an element on which liability depends; but in determining whether contributory negligence exists, the intelligence of the child must be considered; for a child's care must be measured by its intelligence, whether it be the actor or sufferer.

The charge of the court making appellant's liability to depend on its own negligence, the charge given did not injuriously affect it, but might have so operated toward appellee.

It is claimed that the court erred in refusing to give the following charge: "If the jury find the plaintiff went to the turn-table in the company and charge of his older sister; that his older sister was of age sufficient to be responsible for her negligent acts, and while plaintiff was in her care and control, and by her negligence, if any, in turning the turn-table, or the negligence of others in her presence, the effects of which she could have prevented, the plaintiff was injured, the defendant would not be responsible for such injury."

No facts were shown that would have justified the giving of this charge if it could be conceded that negligence of the sister could be imputed to appellee.

The rule on which the charge is based, however, has not been recognized in this state: *Galveston etc. R. R. Co. v. Moore*, 59 Tex. 68; 46 Am. Rep. 265; and it is unnecessary to consider what would be the rule had the sister done some affirmative

act which, concurring with the negligence of appellant, produced the injury.

It is further claimed that the court erred in refusing to give the following charge: "If the jury find from the evidence that the turn-table was so constructed that it was of such weight that a child so young as plaintiff could not move it or revolve it, and that it was turned by boys or girls of age sufficient to be responsible for their negligent acts, and while it was so being turned by such older children the plaintiff was injured thereon, the defendant would not be responsible for such injury."

This charge, in effect, would have informed the jury as matter of law that a railway company was not negligent in leaving its turn-table unfastened, if its weight was such that it could not be revolved by a child of about five years of age; and if there was no other objection to the charge, it was properly refused; for it was the province of the jury to determine whether appellant was negligent, as instructed by the court, looking "to the way in which the turn-table was kept, and the place where it was kept, taking into consideration all the surrounding circumstances in evidence."

For the same reason, the court did not err in refusing to give the fifth charge requested.

There is no complaint made in such manner that it can be considered that the verdict was excessive, though this was urged as ground for a new trial.

There is no error in the judgment, and it will be affirmed.

CONCURRENT NEGLIGENCE. — Where the concurrent negligence of two or more persons results in an injury to a third person, each is answerable therefor: *Village of Cartersville v. Cook*, 129 Ill. 152; 16 Am. St. Rep. 248, and extended note, 250-257.

NEGLECTENCE — INFANTS — TURN-TABLES. — For the rule respecting the liability of railway companies for injuries to infants, caused by leaving their turn tables unguarded in towns and cities, see note to *Woodbrook v. Mobile etc. R. R. Co.*, 14 Am. St. Rep. 595, 596.

FROST v. WOLF.

[77 TEXAS, 488.]

DEEDS — EVIDENCE. — A COPY OF A CONVEYANCE of land in Texas, made before a notary public in Louisiana in accordance with the form and mode usual in that state, is not admissible in evidence as a recorded instrument, though proved and recorded in the county where the land is situated. The error in admitting it is immaterial, if an examined copy taken from the notary's record, subsequently introduced, was properly admitted.

DEEDS — EVIDENCE. — AN EXAMINED COPY of a deed to land in Texas, made before a notary in Louisiana, with proof of the execution of the original and of the names of the parties and payment of the purchase-money, is admissible to prove a conveyance of the land.

DEEDS. — THOUGH AN UNSEALED INSTRUMENT MAY NOT CONVEY the legal title to land, it at least conveys the equitable title.

DEEDS TO PARTNERSHIP. — Though at law a deed made by or to a partnership in the firm name, the full name of neither partner being given, will not pass title to the land, such is not the rule in equity, where the equitable title is deemed to pass.

ANCIENT DEED, PRESUMPTION OF POWER OF PARTNER TO CONVEY. — After the lapse of more than thirty years from the time of execution of a deed by one member of a partnership purporting to act for the firm, his power to act will be presumed, and the deed admitted to prove the conveyance.

DEEDS — CONVEYANCE BY PARTNER. — Where property stands in the name of a firm, one partner in that name may convey the legal as well as the equitable title, if he has authority so to do at the time the conveyance is made, or his act may be ratified by subsequent parol consent.

DEEDS. — PRESUMPTION FROM LAPSE OF TIME, as to power of partner to convey firm property by deed which he assumes the right to make in its name, arises the same as in other cases in which one person has assumed to execute a deed in the name of another.

ANCIENT DEED AS EVIDENCE. — Where an ancient deed, otherwise admissible, is offered in evidence, it is immaterial that its proof or acknowledgment was insufficient to admit it to record.

EQUITY. — PRIORITY OF TIME gives the better equity as between parties having only equitable interests, only when their equities are in all other respects equal.

EQUITY. — PRIORITY OF TIME IS GROUND OF PREFERENCE last resorted to as between parties having only equitable interests. Equity will not prefer one to the other on the mere ground of priority of time, until it finds, upon an examination of their relative merits, that there is no other sufficient ground of preference between them. If one has any equity better than the other, priority of time is immaterial.

EQUITY. — In determining relative equities of parties having adverse equitable interests, the court must direct its attention to the nature and condition of such interests, the circumstances and manner of their acquisition, and the whole conduct of each party in respect thereto, and then apply the test, not of any technical rule, or rule of partial application, but the same broad principles of right and justice which equity universally applies in deciding upon contested rights.

EQUITY.— **MAXIM THAT EQUITY AID THE VIGILANT**, and not those who slumber on their rights, applied to one who holds a stale equitable title to land.

ERROR WITHOUT INJURY is not ground for complaint.

A. S. Fisher and T. B. Cochran, for the appellants.

A. W. Terrell and T. P. Hughes, for the appellees.

STAYTON, C. J. This is an action of trespass to try title to one third of two thirds of a league and labor of land patented to Herman Aiken on January 5, 1847. Plaintiffs are the widow of Samuel Frost, to whom he was married in 1861, and their children, and his children by a former wife. The foundation of their claim is a transfer of a one-third interest in the certificate by virtue of which the land was granted, made to Frost by Aiken on February 21, 1839. That transfer was made by an indorsement on the certificate, and by a more formal conveyance, both of the same date. The consideration for the conveyance evidently was the services of Frost, to be rendered in locating and surveying the land, and the payment of such expenses as might be necessary.

The instrument contains the following language: "Know all men by these presents, that I, Herman Aiken, for and in consideration of the sum of — dollars, as well as the expenses on the following certificate, as well as Samuel M. Frost's services selecting and locating, I have this day bargained, sold, and conveyed . . . one third; . . . and on his returning the field-notes of said survey and the surveyor's certificate under oath that he has divided the above claim equally and equitably under oath to the surveyor of the county in which said land may be made, and then authorize the proper officer or officers to make to him a good and sufficient title or patent for the same," etc.

This instrument thus evidences an intention that Frost might locate his interest separately, and have patent therefor directly to himself. The land was not surveyed until some time in 1846, when it was located in one body, which at date before named was patented to Aiken. There is no evidence that Frost located the land or incurred any expense in procuring the title, and this action was not brought until November 19, 1885.

Samuel Frost died in 1866, and although administration was had upon his estate, no claim was asserted to the land in controversy by him or his heirs until this action was brought.

On February 9, 1847, Herman Aiken conveyed the land to Wilbur and Ellis, he then having possession of and delivering to his vendees the patent to the land. Appellees claim through that conveyance, to which, however, appellants make several objections.

Defendants pleaded the defenses usual in this class of cases, and further alleged that appellants' claim was barred by the statutes of limitation, and that such time had elapsed as to make it a stale claim.

The cause was tried without a jury, and, without passing on the defenses of limitation, the court held that appellees showed title, and that appellants' claim was stale, and thus barred. The evidence of right under which appellants claim was never recorded in the county in which the land is situated.

The conveyance from Aiken to Wilbur and Ellis purports to have been made to them as a firm and in the firm name, and it was made before a notary public in the state of Louisiana, in accordance with the form and mode usual in that state, the original being entered in the notary's book, signed by him, by Aiken, and Wilbur, who represented the firm of Wilbur and Ellis, as well as two witnesses.

A copy of that instrument, as is usual in that state, duly certified by the notary, was delivered to Wilbur and Ellis. That paper, after having been proved up, as would perhaps have been sufficient to admit it to record had it not been a copy, was recorded in the county in which the land was situated, and on the trial that paper was admitted in evidence, over the objections of appellant, presumably as a recorded instrument.

That ruling, we think, was error; for the law does not provide for the record of such copies. This ruling, however, is immaterial, if an examined copy taken from the notary's record, subsequently introduced, was properly admitted.

The objections to this examined copy were twofold. It was insisted that the execution of the original from which the copy was taken was not sufficiently established.

The testimony of three witnesses who had examined the original on the notary's record showed that the copy offered in evidence was a true copy of that; that the notary and one of the subscribing witnesses were dead, and their evidence leaves but little, if any, doubt that the other witness was dead.

Their evidence also showed that they were familiar with the handwriting of the notary and witnesses, and that the signa-

tures appearing to the original on the notary's record were their genuine signatures.

One of these witnesses was Wilbur, of the firm of Wilbur and Ellis, who testified not only to the genuineness of their signatures, but to the further fact that he saw Aiken and the other persons whose names thereon appear sign it, and that he signed it.

The execution of the instrument on the notary's record being thus shown, and the copy offered being shown to be a true copy of that record, we are of opinion that it was properly admitted, for the original, being a record of another state, could not be produced.

It was urged, however, if the objections noticed were not tenable, that the copy should have been excluded because the original was not sealed, as conveyances of land were then required to be by the laws of this state, and because it purported to be a conveyance to a firm, and not to the individuals composing it.

It may be that the unsealed instrument did not convey to Wilbur and Ellis the legal title to the land, but it cannot be held that it did not convey to them the equitable title, unless it be the law that a conveyance made to a partnership in the firm name is a nullity: *Miller v. Alexander*, 8 Tex. 37; *Holman v. Criswell*, 13 Tex. 38; *Martin Weyman*, 26 Tex. 466; *Tom v. Sayers*, 64 Tex. 342; *Wadsworth v. Wendell*, 5 Johns. Ch. 224; *McCaleb v. Pradat*, 25 Miss. 258; *Dreutzer v. Baker*, 60 Wis. 180; *Devlin on Deeds*, 246; *Pomeroy's Eq. Jur.*, sec. 386.

Payment of consideration of two thousand dollars for this and other lands was shown.

The conveyance, as before said, purports to be to "Wilbur and Ellis" as a firm, and it is shown who composed that firm, and that both members of it were present and consenting to the conveyance thus made.

It may be conceded that at law a deed made to or by a partnership in the firm name, the full name of neither partner being given, would not pass title to the land, but such is not the rule in equity: *Baldwin v. Richardson*, 33 Tex. 16; *Lowery v. Drew*, 18 Tex. 786; *Byam v. Bickford*, 140 Mass. 31; *Tidd v. Rines*, 26 Minn. 211; *Beaman v. Whitney*, 20 Me. 413; *Lindsay v. Hoke*, 21 Ala. 543; *Slaughter v. Swift*, 67 Ala. 494; *Chicago Lumber Co. v. Ashworth*, 26 Kan. 212; *Morse v. Carpenter*, 19 Vt. 615; *Hunter v. Martin*, 2 Rich. 541; *Printup Bros. v. Turner*, 65 Ga. 71; *Bates on Partnership*, 296.

We are of opinion that the examined and proved copy was properly admitted in evidence, and as it was the same as the notarial copy introduced, no injury resulted from the improper admission of the latter, there being no question of notice to be affected by the registration of that paper.

On December 1, 1847, Wilbur and Ellis, in the firm name, but acting through Wilbur, conveyed the land to E. A. Bridge, since deceased, and defendants claim through deeds made by the widow and only son of Bridge, of dates running from 1878 to 1883.

No actual possession was taken of the land until 1879, and none of defendants had actual notice of plaintiff's claim until this action was brought.

Some of the defendants had paid all of the purchase-money, and others only a part, when this action was instituted.

The deed from Wilbur and Ellis recites that "I, A. C. Wilbur, of the firm, in this city, of Wilbur and Ellis, and herein representing said firm of and in the said city of New Orleans, for the consideration of twelve hundred dollars to us paid by E. A. Bridge, also of New Orleans, have granted, bargained, sold, and released," etc. It was signed in the firm name, and acknowledged by Wilbur for the firm, before a commissioner of deeds for Texas, resident in the state of Louisiana.

It is urged that the court erred in admitting in evidence that deed. The objections to it were: "1. It purported to convey the title of Wilbur and Ellis, and was signed by only one member of the firm; 2. It was not signed by the individuals composing the firm, and did not disclose any authority for the member signing to act for the firm; 3. It does not disclose the interest of each member of the firm; 4. It was not properly authenticated for record, nor duly recorded."

While the authority of Wilbur, except such as he may have possessed as partner, is not shown, after the lapse of more than thirty years, the authority must be presumed to have existed. In this view, it is unimportant whether the partnership was one for the purpose of dealing in real estate, the property strictly partnership assets, or held by the members of the firm as tenants in common.

If property stands in the name of a firm, one partner in that name may convey at least an equitable title to it, if he has authority at the time the conveyance is made, or his act may be ratified by subsequent parol consent; and the writer sees no reason why, if he has authority, the legal title should

not be held to pass by such a conveyance: *Lowery v. Drew*, 18 Tex. 786; *Baldwin v. Richardson*, 33 Tex. 16; *Peine v. Weber*, 47 Ill. 44; *Lawrence v. Taylor*, 5 Hill, 109; *Herbert v. Hanrick*, 16 Ala. 581; *Grady v. Robinson*, 28 Ala. 289; *Gunter v. Williams*, 40 Ala. 561; *Darst v. Roth*, 4 Wash. 471; *Wilson v. Hunter*, 14 Wis. 683; 80 Am. Dec. 795; *Pike v. Bacon*, 21 Me. 280; 38 Am. Dec. 259; Devlin on Deeds, 110, and citations; Bates on Partnership, 292, 416, and citations.

The same presumptions arise from lapse of time as to power of a partner to bind the firm by a deed which he assumes the right to make in its name, as arise in other cases in which one person has assumed to execute a deed in the name of another. That the deed may not have been properly authenticated for record is a matter of no consequence in so far as the question of its admissibility is concerned, for it was admissible as an ancient instrument.

It is contended that, for reasons before noticed, if the deed to Wilbur and Ellis conveyed any title, it was one equitable in character; and further, that it was only a quitclaim deed, and that the claims of both parties being only equitable, that of appellant, being the older one, ought to prevail. It may be conceded that the deed to Wilbur and Ellis was only a quitclaim, and that the title that passed by it was equitable; but it cannot be denied that it passes all the right Aiken had when he executed it, or would now have if he had not conveyed.

Under the conveyance of an interest in the land certificate through which appellants claim, how would the matter stand had Aiken never conveyed the land, and were this action against him? That Frost was to perform services and expend money as the consideration for the conveyance cannot well be controverted; and in the absence of evidence showing that he did these things, a court of equity would not enforce the claim now urged, even if it were not stale. The first step taken to enforce the claim was taken more than forty-five years after the contract was made, and more than thirty-seven years elapsed after Aiken took patent to himself before the claim was asserted.

The receipt of the patent in his own name by Aiken was an act hostile to the claim now asserted, and this was done about nineteen years before the death of Samuel Frost, and thirty-eight years elapsed before this action was brought, during which no claim was asserted.

Frost, during his lifetime, paid no taxes, nor did those interested in his estate do so, or even inventory the land as a part of his estate.

The presumption under such facts ought to be, that the contract between Aiken and Frost was in some manner rescinded, or that the latter did nothing to entitle him to any part of the land; and this presents just the case in which the defense of stale claim should be recognized; and the fact that those holding under Aiken may not have a complete legal title furnishes no reason why the same defense should not avail them.

Wilbur and Ellis bought from Aiken soon after the patent issued; that was in possession of Aiken, and furnished the highest evidence of right; was by him exhibited, made a part of the conveyance, and delivered to his vendees, who paid valuable consideration for the land without any actual notice of adverse claim.

If Frost was equitably the owner of a part of the land, he had it in his power to have had so much patented to himself; and it was negligence to permit Aiken to go before the world and upon the market with the highest evidence that he was the owner of that which appellants now claim. Can one who has thus been negligent, when he must have known that this might operate to the injury of others, claim that he has equal equity with one who purchased from another holding evidence of title superior to all other persons?

Wilbur and Ellis conveyed to Bridge, and his widow and only heir conveyed to defendants more than thirty years after the patent issued; and during all this time neither appellants nor their ancestor took any steps to assert their claim, when they must have known that their silence was likely to lead to the injury of persons who had no means of acquiring knowledge of their secreted claim. Can they now be said to have a claim which so commends itself to the conscience of a court of equity or to a common sense of justice as does the claim of those who, relying upon the patent to Aiken, have purchased upon the faith of that, unassailed for so long a period, being the superior title to all others? If not; then they have not a right which ought to be given priority, neither holding the legal title.

A distinguished English judge, in commenting on the maxim on which appellants rely, in a case in principle much like the present, well said that "as between persons having only equi-

table interests, if their equities are in all other respects equal, priority of time gives the better equity. . . . But in order to ascertain and illustrate the meaning of the rule itself, I think the meaning is this: that in a contest between persons having only equitable interests, priority of time is the ground of preference last resorted to; i. e., that a court of equity will not prefer the one to the other on the mere ground of priority of time until it finds upon an examination of their relative merits that there is no other sufficient ground of preference between them, or in other words, that their equities are in all other respects equal; and that if the one has on other grounds a better equity than the other, priority of time is immaterial.

"In examining into the relative merits (or equities) of two parties having adverse equitable interests, the points to which the court must direct its attention are obviously these: the nature and condition of their respective equitable interests, the circumstances and manner of their acquisition, and the whole conduct of each party with respect thereto. And in examining into these points it must apply the test, not of any technical rule or any rule of partial application, but the same broad principles of right and justice which a court of equity applies universally in deciding upon contested rights": *Rice v. Rice*, 2 Drew, 78.

There is another rule in equity which finds application in this case, which is, that equity aids the vigilant, and not those who slumber on their rights.

"A court of equity, which is never active in relief against conscience or public convenience, has always refused its aid to stale demands when the party has slept upon his rights and acquiesced for a great length of time. Nothing can call forth this court into activity but conscience, good faith, and reasonable diligence," was the utterance of a distinguished English chancellor.

If appellants or their ancestor ever had a right which might have been enforced against Aiken holding a patent, it was one equitable in character, and having slept upon it so long, ought not now to be heard to assert it, even against the subsequently acquired equity of the defendants.

The cross-interrogatories to Wilbur which were not answered by him related mostly to and called for his opinion as to the effect of instruments in evidence to which appellants were not entitled; and had all others been by him answered in a manner most favorable to them, such answers could not have

changed the result; hence no injury resulted to appellants from the ruling of the court complained of in the fifth assignment.

There is no error in the judgment, and it will be affirmed.

EVIDENCE — DEEDS. — Copy of a deed, when admissible in evidence: See *Semlan v. Wright*, 13 Pick. 523; 25 Am. Dec. 344, and note 342, 350. The record of a deed without revenue stamps is admissible, even though the record does not disclose that the stamps were affixed to the deed as required; for it is presumed that the original deed had the proper stamps affixed: *Cotline v. Vallean*, 79 Iowa, 626.

DEEDS — ANCIENT INSTRUMENTS. — As to when a deed is so ancient that its execution need not be proved, see *Settle v. Allison*, 8 Ga. 201; 52 Am. Dec. 302, and note. An instrument produced from the proper custody, and over thirty years old, being such that if genuine it would be valid, is admissible as an ancient instrument: *Parker v. Chancellor*, 73 Tex. 495; *Warren v. Fredericks*, 76 Tex. 648; *White v. Hutchings*, 40 Ala. 253; 88 Am. Dec. 766, and note.

DEED — EFFECT OF OMISSION OF SEAL. — A deed void in law, owing to the omission of a seal, will be established in equity, where it is evident that the grantor intended to make a valid conveyance: *Beardsley v. Knight*, 10 Vt. 186; 33 Am. Dec. 193.

PARTNERSHIP, CONVEYANCES TO, USING FINE NAME. — Effect and validity of: See *Mesage v. Burkr*, 43 Minn. 231; note, p. 235, and particularly note

FREEMAN v. HAWKINS.

[77 TEXAS, 48.]

JUDGMENT, MISTAKE IN NULLIFYING. — Marriage confers on the woman the surname of her husband, and a citation by publication requiring "Mary E. Robinson," defendant's maiden name, to be cited and to appear in an action is not sufficient to give the court jurisdiction to render a binding judgment against "Mary E. Freeman," the name that defendant acquired by marriage.

EVIDENCE — RECORD OF FORMER SUIT, WHEN NOT ADMISSIBLE. — When plaintiff in ejectment claims title as the grantee of certain parties alleged to be sole heirs of the original patentee, and defendant claims under another person as heir of the same patentee, the record in a suit in which such alleged sole heirs recovered other land as the sole heirs of the patentee as against a third person is not admissible against defendant, who was not a party to that suit, to prove that such persons were the sole heirs of the patentee.

Brown and Gunter, and E. H. Lott, for the appellants.

Davis and Garnett, E. A. Blanton, and H. E. Eldridge, for the appellees.

STAYTON, C. J. This action was brought in right of Mary E. Freeman, the wife of D. C. Freeman, to recover a tract of land patented to James Rose.

She claims through conveyance from Louis and Margaret Rose, who are alleged to have been the father and mother of James Rose, who died without issue.

Defendants claim through a woman other than Margaret Rose, whom they assert to have been the mother of James Rose, and they admit and claim that he was the natural son of Louis Rose.

There was much evidence as to the maternity of the grantee, and appellants claim that it required a finding that he was a son of Louis and Margaret Rose, who were husband and wife, but the evidence bearing on the question was conflicting, and we could not hold that the court below might not with propriety have found that he was the son of the woman through whom appellees claim.

If such was the finding, it would be conclusive of the rights of the parties; but in the absence of conclusions of fact and law, we cannot know on what the judge who tried the cause based his judgment, for there was evidence introduced upon another matter which may have been thought decisive of the case.

Appellants were married on March 9, 1869, and have resided in this state since 1871.

D. C. Freeman held under chain of transfer from Louis and Margaret Rose, but prior to his marriage to his co-plaintiff, conveyed to her, her name being Mary E. Robison.

Some time after their marriage, but prior to February 11, 1878, Henry Lewis, through whom appellees claim, brought a suit in the district court of the county in which the land is situated against Mary E. Robinson, to recover or to remove cloud from his title to the land.

Service was had only by publication, and at date last named a judgment was rendered in favor of Henry Lewis, against Mary E. Robinson, for the land.

On the trial of this cause, appellees were permitted to offer in evidence that judgment, and the court may have held that it was decisive of the rights of the parties, although he may have been of the opinion that James Rose was shown to be the son of Louis and Margaret Rose. On the marriage of Mary E. Robison, the law conferred on her the surname of her husband: Bishop on Marriage and Divorce, 704. A citation,

whether to be served personally or by publication, must contain the names of the parties to the action: R. S., art. 1215.

We are of opinion that a citation by publication requiring Mary E. Robinson to be cited and to appear was not sufficient to give the court jurisdiction to render a judgment that would bind Mary E. Freeman: *McRee v. Brown*, 45 Tex. 506.

If there had been actual service on Mrs. Freeman under the name of Mary E. Robinson, it might have been her duty to appear, even though cited in the wrong name, and although her husband was not made a party defendant with her; but the case before us is one in which she was only cited by publication, issued on the ground that she was a non-resident of the state, which was untrue. She had no knowledge of the pendency of the suit against Mary E. Robinson, or opportunity to defend it. She was not a party to the suit, and is not bound by the judgment, and it should not have been admitted for any purpose: *Dunlap v. Southerlin*, 63 Tex. 38.

On August 10, 1855, Louis Rose and wife, through their attorneys, brought an action against Thomas Collins, in the district court for Travis County, to recover a land certificate other than that by virtue of which the land in controversy in this cause was granted, which had been issued to James Rose. In that action they claimed as the father and mother and as sole heirs of James Rose, and recovered the certificate.

Appellants offered to read in evidence the petition, answer, and judgment in that cause, which the court excluded. In this ruling we are of the opinion there was no error.

The averments of the petition in that case were essentially self-serving, and we understand the rule to be that a bill in equity coming under such circumstances cannot be received in evidence even on a question of pedigree: *Starkie on Evidence*, 439; *Wharton on Evidence*, 210, with cases cited in notes to both.

Appellees were not parties to that suit; it was not in relation to property involved in this, and no part of the proceedings therein ought to have been received in evidence to prove the heirship of the persons through whom appellants claim: *Pratt v. Jones*, 64 Tex. 694.

For the error before noticed, the judgment will be reversed, and the cause remanded, that the court below or a jury may pass on the issues of fact involved in the case.

JUDGMENT — MISNOMER. — Notwithstanding the misnomer of a defendant, if the writ is served upon the party intended to be sued, and he fails to appear and plead in abatement, and suffers judgment by default, he is concluded thereby: *First Nat. Bank v. Jagers*, 31 Md. 38; 100 Am. Dec. 53, and note; *Lindsey v. Delano*, 78 Iowa, 350. Discrepancy between the names "Rike" and "Pike" is material: *Newman v. Bosers*, 72 Iowa, 465. Service upon Mrs. G. B. L., the wife of G. B. L., and judgment by default against Ora M. L., it appearing that the woman was equally well known by both names, does not authorize her to assail the judgment upon the ground that no notice had been given to her: *Peterson v. Little*, 74 Iowa, 223. A discrepancy merely in spelling, not in sound, as "Van Nortrick" for "Van Nortwick," is immaterial: *Millory v. Riggs*, 76 Iowa, 748. Where a defendant was garnished in a judgment against N. Y., but in the notice of garnishment the debtor was designated as "N. Y. or N. S. Y.," and the garnishee answered that he was indebted to N. S. Y., not to N. Y., and thereupon was discharged as to N. S. Y., the discharge was not an adjudication that N. S. Y. was not in fact the judgment debtor: *Allison v. Chicago etc. R. R. Co.*, 76 Iowa, 209.

BANKERS' AND MERCHANTS' MUTUAL BENEFIT ASSOCIATION v. STAPP.

[77 TEXAS, 517.]

BENEFIT ASSOCIATION. — CONDITION IN CERTIFICATE OF MEMBERSHIP of a mutual benefit society denying agents the power to make, alter, or discharge contracts, waive forfeitures, or extend credits has no application to the general manager or secretary of the association.

BENEFIT ASSOCIATION — MEMBERSHIP — PAYMENT OF FEE. — When, in an action on a certificate of membership in a benefit society, the defense of non-payment of the fee required as a condition precedent to membership is relied upon, and it is shown that the association had forwarded a certificate to the deceased, whose account as its agent was in a confused condition, and who had received, as an overpayment, part of a remittance sent him as its agent, after it had received from him an installment of annual dues, published his name in a list of members, and had levied a mortuary assessment on him as if he were a member, the jury is warranted in finding that the certificate was issued on credit; that the fee had been paid, or its payment waived as a condition precedent.

BENEFIT ASSOCIATION — ASSESSMENT PAID BY BENEFICIARY. — Where the certificate of membership in a mutual benefit society provides that assessments shall be paid within thirty days from the date of notice, payment within that time will preserve the validity of the certificate, though such payment is made by the beneficiary after the death of the member.

Brown, Gunter, and Bliss, for the appellant.

C. N. Buckler, for the appellee.

STAYTON, C. J. On August 17, 1886, W. S. Stapp died, holding a certificate of membership in appellant corporation,

which in terms entitled appellee to five thousand dollars on the death of her husband. On the death of the husband, the company refused to pay, and this action was brought.

The defenses urged were, that the deceased had failed to pay the sum of \$10 as a fee for membership required to be paid before membership could exist or the certificate be operative, and that he during life had failed to pay a mortuary assessment of \$6.65, made on August 2, 1886, of which notice on that day was mailed from the home office in San Francisco, California, to Sherman, Texas, the residence of the deceased.

The certificate of membership bears date March 20, 1886, but it was not delivered until some time after May 23d of same year, when it was sent to deceased, who was agent for the corporation at Sherman, Texas, in pursuance of a letter of that date, which contained the following language: "Why has my policy never been sent me? 'T is true that I have not been making much money since I have been here, but have always had ten dollars to pay my dues."

The certificate of membership provides that "th's certificate of membership is not binding until the first payments due thereunder shall have been fully received in cash by the association, or some agent authorized to receive the same, and during the life of said member."

Appellant's general manager wrote to Stapp July 14, 1886: "Again I call your attention to reporting back business, including your own premium. If you don't want your certificate, send it back; it is no earthly good to you without premium paid."

He again wrote on July 20, 1886: "We have forwarded certificates to the amount of one hundred and twenty-three thousand dollars. We have received remittances from you of \$171, leaving a balance due us of \$75, independent of your own certificate, upon which there is due \$10. We have credited up May certificates as paid on our books; amount, \$136; leaving a balance to credit of June certificates to the amount of \$35, which we will credit on return of this report with advices. Please remit the full amount at your earliest convenience, and let us make a new start, and keep matters in proper shape in the future."

The last letter written by Manager Allen, dated August 16, 1886, did not arrive until after Stapp's death. Among other things, it says: "Then there is your own policy not paid for,

issued on the twentieth day of March, and you being sick, as your clerk informs us, we could not receive payment for same until you regain your health and be examined, as typhoid fever tends to undermine a person's constitution."

J. B. Thurmond, appellant's secretary during 1886, testified that he never received any money or its equivalent from W. S. Stapp, or any other person, in payment for the annual dues on the certificate sued on as described in the receipt signed by the witness (being the receipt introduced in evidence by the plaintiff); that the same, if sent, was sent to W. S. Stapp, as general agent, for collection, the same as though collecting dues from any other person on any other certificate of membership; that Stapp never paid his dues, to witness's knowledge, though often requested so to do; that any of the officers, however, had power to receive and receipt for annual dues; that Stapp did remit certain amounts of money from Texas, but as to their application witness could not state. Did n't know whether certificate was sent to Stapp in compliance with his request, or not. The correspondence of the association was conducted by witness, general manager, and Badlam, the president."

The annual dues referred to by this witness and others do not relate to the premium or fee for membership, but to an annual payment, in addition to mortuary assessments of fifteen dollars, which each member was required to pay on or before March 20th of each year.

The receipt for such dues was offered in evidence by the plaintiff, and was as follows:

"SAN FRANCISCO, March 20, 1886.

"Received fifteen dollars for annual fees, according to the terms and conditions of certificate No. 442, on the life of W. S. Stapp, from March 20, 1886, to March 20, 1887.

"To be countersigned by W. S. Stapp.

"J. B. THURMOND, Secretary."

The certificate of membership declares that "in consideration of the representations, agreements, and warranties made in the application for this certificate of membership, and of the payment of the admission fee, and of fifteen dollars, being the amount of dues for expenses, to be paid on or before the twentieth day of March in each year and every year during the continuance of this certificate, and of all mortuary assessments as per table indorsed hereon, payable at the home office of the association within thirty days from the date of

each notice, the Bankers' and Merchants' Mutual Life Association of the United States does hereby create and constitute William Sheppard Stapp of Los Angeles, county of Los Angeles, state of California, a member of this association, and issue this certificate of membership, subject to the following agreement."

At the date of that certificate Stapp was a resident of Los Angeles.

"R. K. Allen, general manager of appellant during 1886, testified that appellant had never received a cent from Stapp in payment of annual dues on certificate No. 442, sued on; that the certificate was sent to Stapp by mail by witness Thurmond, appellant's secretary, at Stapp's request, he saying he had the money to pay for it, in answer to Stapp's letter dated May 23, 1886; that the secretary was the proper party to receive the dues; that witness knew of no other person connected with appellant who ever received said dues; that President Badlam and witness attended to correspondence of appellant after May 23, 1887; that Stapp, though repeatedly urged, had never written a word with reference to the certificate, not even acknowledging its receipt. The partial list of members printed in our circulars was composed of those who had applied for membership. A man who has not paid his annual dues or premium, or has not in some satisfactory manner arranged for their payment, is not, under the rules of the association, liable to assessments. The money received by appellant from Stapp was on certificates issued to others, not Stapp. Appellant's business is cash, and no charge for fees was made in Stapp's case. Stapp's name was included among those assessed, but he would not only have had to pay the assessments and back dues, but would also have had to undergo another medical examination, to entitle him to beneficial membership. The notices of assessments are sent to delinquents in order to give them an opportunity to reinstate themselves."

Badlam, president of appellant, testified that he knew the annual dues were never paid.

The statement of the testimony of the secretary, general manager, and president is taken from brief of counsel for appellant, and although abbreviated, is correct.

We understand the witness Allen, however, to say that Stapp never paid any money as premium, annual dues, or on mortuary assessments.

It was agreed that Stapp wrote the letter of date May 23, 1886, and that the letters of July 14 and 20, 1886, were written to him by the general manager, and deposited in the post-office at San Francisco for transmission, but there is no evidence whether Stapp received them.

Plaintiff offered in evidence three different printed circulars prepared and circulated by appellant, explaining its system and advertising its business. Those circulars contained a long list, although purporting to be only a partial list, of the members of the association, with statement of amount of insurance held by each. Among these was the name of W. S. Stapp, with statement that he had insurance to amount of five thousand dollars, and one in which his name appeared as a member was headed "Reference to some of our most prominent members."

On August 2, 1886, appellant made a mortuary assessment on its members, each amounting to \$6.65, and this sum Stapp was requested to pay. The letter which accompanied that notice of assessment was as follows: —

"*Dear Sir,* — Proof of death of the above-named member having been received on July 16, 1886, and found satisfactory, payment of the amount due according to the terms of the certificate has been ordered, and an assessment is now due from you, payable at this office within thirty days from date above (on or before September 2, 1886), according to the terms of your certificate of membership and the by-laws. Please send promptly, and avoid forfeiting your membership."

In reference to that assessment, Allen wrote to Stapp on July 26, 1886, that on May 28th preceding the association had met with a death loss under certificate No. 339, and that an assessment would be made to pay the same on August 2d, payable in thirty days, and giving him in the letter a list of names of certificate-holders in Texas agency liable for assessment, and among the names is that of W. S. Stapp. The letter concludes as follows: "They having been insured prior to the death." The letter also informs him that the City Bank of Sherman would attend to collections.

After the death of her husband, Mrs. Stapp sent to appellant the amount of the assessment which was payable on or before September 2d, but it was returned to her on August 27, 1886, with this statement: "We return same to you, as this association has no claim for assessments from your late husband,

W. S. Stapp, as he forfeited his certificate, not having paid the premium."

This letter abounds in words of sympathy, but insists upon the letter of the contract.

R. K. Allen, on August 5, 1886, wrote to W. S. Stapp as follows: "Wells, Fargo, & Co. called and collected nine dollars from us on account of this agency at Sherman, Texas. You will recollect a remittance of thirty-one dollars, which only ought to have been twenty-two dollars. Please send at once a detailed report of all policies collected by you, with money to balance. We want to get our books and your account in shape, and start right. Your account has been a jumbled up mess since the commencement."

The court instructed the jury that appellee was not entitled to recover if they found from the evidence that the membership fee or premium was not paid, unless they believed from the evidence that the certificate of membership was delivered upon a credit; "that is, that said certificate was so delivered by defendant with the intention that it should take effect upon delivery, and it would rely upon its right and expectation to collect such payment after such delivery, then a failure to make said payment will constitute no defense to this suit, and you will in such case find in favor of plaintiff, as instructed in first paragraph of this charge."

It is urged that the court erred in giving the part of the charge last referred to, and that it erred in refusing to give the first and second charges asked by appellant.

The charges refused contained the proposition that, in the absence of actual payment of the premium during the life of the insured, the policy never took effect. It was, that if "the certificate of membership was delivered to W. S. Stapp upon credit, to be paid for in the future, then the certificate of membership did not become binding upon the defendant, and you will therefore find for the defendant."

The policy had the usual clause denying to agents the power to make, alter, or discharge contracts, waive forfeitures, or extend credits.

It is claimed that there was no evidence that justified a submission to the jury whether a credit was given, and that the verdict is without evidence to support it.

It is further urged that the court erred in refusing to give a charge requested declaring what would constitute a delivery of the certificate with intent to give credit, and make it oper-

ative from time of delivery. The charge last referred to was substantially embraced in the charge of the court, which it is contended ought not to have been given, because there was no evidence sufficient to raise such an issue of fact. The charge having been once given, it was not error to refuse to repeat it.

All matters affecting the certificate in question were transacted between the general manager and secretary of the appellant corporation and the deceased; and we see no reason to doubt the power of these officers to extend credit, notwithstanding the terms of the certificate: Wood on Insurance, 28-35, and citations; Bacon on Benefit Societies, 366-372.

The evidence of the general manager, wherein he states that "a man who has not paid his annual dues or premium, or has not in some satisfactory manner arranged for their payment, is not, under the rules of the association, liable to assessment," recognizes the fact that payment of premium in advance was not deemed absolutely essential to the existence of membership.

The main questions in the case are, whether the deceased paid the premium, or was given credit thereon; and it is claimed that there was no evidence to sustain a finding in favor of appellee on either of these issues. The certificate bears date March 20, 1886, and it is rendered clear that it was not delivered until some time after May 23d of that year. If it had been held from the time of its date until the letter of the deceased was written inquiring why it had not been sent because the premium had not been paid, the inference would be very strong that it was not sent until payment was made, notwithstanding the letter of the general manager of date July 14, 1886, which is not shown to have been received by Stapp.

This inference is strengthened by the fact that the secretary, whose business it was to receive moneys, does not state that the premium was not paid, although he testifies fully as to the non-payment of annual dues.

He also (as does the general manager) fails to produce a copy of the letter accompanying the certificate, and it seems that it never was kept, although it is usual to keep copies of all letters sent.

The facts hereafter to be noticed on the question whether credit was extended have bearing as well on the question of actual payment of the premium.

Was the deceased recognized as a member, subject to the burdens of membership? If so, this must have resulted from the fact that he had paid the premium and all other dues, or that credit had been extended to him.

Annual dues amounting to fifteen dollars a year, payable on or before March 20th of each year, were required only of members.

From the terms of the certificate of membership, we would not understand that the annual dues were to be paid in advance, yet we find in the possession of the deceased a receipt bearing the same date as his certificate of membership, which is at least *prima facie* evidence that he paid the annual dues for the year ending March 20, 1887.

That it was not countersigned by himself does not deprive it of weight as evidence of the fact that he made that payment, and the defense is not based on his failure in this respect, but on the claim that he failed to pay the premium and an assessment.

This receipt could have been sent to him only as evidence of the fact that he had paid the annual dues named in it, or to be used as evidence of that fact when the payment was actually made.

If for the former purpose, it furnishes the strongest evidence that the deceased was a member, which it was claimed he could not be without actual payment of the premium.

If it was sent for the latter purpose, appellant cannot well be heard to say that he was not recognized as a member; for if such was not his relation to the association, it had no right to demand annual dues of him. In repeated circulars published to the world, he was declared to be not only a member, but a prominent member, holding a certificate for five thousand dollars. If this was his character, it must have been established by the payment of all sums necessary to create it, and to keep it in existence until the circulars were published.

On July 26, 1886, the general manager notified the deceased of the death of a member, on account of which it would be necessary on August 2d following to make an assessment on members named, of whom the deceased was stated to be one. Promptly on the 2d of August that assessment was made on the deceased. None but members were liable to assessment, and the corporation having full means of knowing who were and who were not members of the association, a jury probably

would have great difficulty in coming to the conclusion that the officers of appellant corporation had called upon a person not a member to bear the burdens which membership alone could lawfully impose.

Circumstances sometimes become more potent than direct evidence; and if the jury, from the circumstances already referred to, concluded that the officers of the corporation were acting with knowledge and in good faith when they called upon the deceased to bear the burdens of membership, this court would not be authorized to set their finding aside. These demands could not have been made in good faith if deceased was not a member, and he could not be a member without payment of or satisfactory arrangement made for payment of the premium. No one but the general manager states that the premium was not paid, while it is shown that the president and secretary of the corporation had the right to collect premiums and other dues, and this duty seems to have devolved mainly on the latter.

Neither of the officers last named state that the premium was not paid, although this was one of the vital issues in the case, but do testify that the annual dues were not paid, which was a fact pertinent only on the question whether deceased had been recognized as a member.

Within twelve days of the death of Stapp we see the appellant corporation returning to him, through the express company, a sum nearly equal to the premium which it is claimed had not been paid, and this because of a remittance larger than it ought to have been, while in other cases remittances had been appropriated as the officers of the corporation deemed proper, without having received instructions as to the accounts to which credit should be given.

That under such a course of dealing money should have been returned to deceased the jury probably found it difficult to reconcile with the claim that he had neither paid nor made satisfactory arrangements to pay the premium on the certificate; and especially so in view of the fact of the corporation's constant recognition of the fact that he held such membership as justified the imposition of burdens upon him which could not lawfully or in good faith be placed on one not a member.

The evidence tends to show that the accounts between the deceased and the corporation were loosely kept, and the premium may have been paid and by the latter placed to some

other account. But looking to all the evidence, circumstantial as much of it is, we cannot say that there was not evidence requiring the court to submit to the jury whether the premium had not been paid or arrangement for its future payment satisfactory to the company entered into. Nor are we prepared to hold that there was not evidence sufficient to sustain the verdict, although the direct evidence preponderates in favor of the proposition that the premium was neither paid nor credit therefor given.

It is claimed that the failure to pay the assessment made on August 2, 1886, before the death of the husband of appellee, defeats her right to recover, notwithstanding she tendered the sum of the assessment within less than thirty days after the assessment was made and notice thereof mailed. The certificate of membership declares that such assessments shall be "payable at the home office of the association within thirty days from the date of each notice." The by-laws of the company contain substantially the same provision, and provide for the restoration of a member in case assessment be not paid within the time prescribed.

We are of the opinion that the beneficiary in the certificate had the right at any time within thirty days after the date of the notice of assessment to pay it. Any other construction of the language would be unreasonable, contrary to the import of the language used, and in many cases destructive of right when there had been no known omission of duty by the member or beneficiary.

We find no error in the proceedings that led to the judgment, and it will be affirmed.

MUTUAL BENEFIT ASSOCIATIONS. — Whether Insurance Companies. — If any distinction exists between the large number of benevolent endowment societies now in existence and operation, and mutual insurance companies incorporated under the laws of the various states, the books fail to make such distinction clear. The question is sometimes an important one in determining whether or not such societies come within the scope and operation of the statutes of the several states requiring mutual insurance corporations to deposit securities or indemnity funds for the protection of policy-holders.

The doctrine generally maintains that where the whole purpose of an association is the mutual insurance of its members, and the only qualifications required for membership are that the applicant shall be in a certain condition of health and within a certain age, the society is an insurance company and liable under the law governing such corporations: *State v. Ottens*, 6 Mo. App. 163; *State v. Brainerd*, 15 Mo. App. 597; *Commonwealth v. Wetherbee*, 105 Mass. 149; *State v. Merchants' Exchange etc. Society*, 72 Mo. 146; *State v. Northwestern Mut. Live Stock Ass'n*, 16 Neb. 549; *Miner v.*

Michigan etc. Ass'n, 63 Mich. 338; *Holland v. Taylor*, 111 Ind. 121; *Presbyterian etc. Fund v. Allen*, 106 Ind. 593; *National Mutual Aid Society v. Lyppold*, 101 Pa. St. 111. The mere fact that the amount payable on the death of a member is not fixed, but depends upon the number of members in the society at the time of the death, does not change the character of the association; nor does the fact that there is no obligation on the part of a member enforceable in a court of law to pay any sum by way of premium in any manner alter its character. The rule is thus laid down in *State v. Citizens' Benefit Ass'n*, 6 Mo. App. 163: "Though the amount payable is not a gross sum, but a sum graduated by the number of persons in a given class at the time of the death of the insured, and though there is no means of compelling the payment of the assessment made upon the death, and though the insurer is not liable for the amount actually collected from members upon the happening of the loss, the agreement may be a real contract of insurance, where there is a payment of consideration by one, and a promise by the other to pay upon the happening of the loss; and where the main object of the company making such contracts is to do such insuring, it is doing an insurance business within the meaning of the statute, and cannot evade the insurance laws by calling itself a benevolent society, and obtaining its charter as such." To the same effect, *Elkhart Mutual Aid etc. Ass'n v. Houghton*, 103 Ind. 286.

The contracts made between such mutual aid companies and their members, by the certificates of membership, do not ordinarily differ in any essential particular from an ordinary policy of mutual life insurance. They have all the characteristics of an insurance contract, and are governed by the rules of law applicable to the latter: *Elkhart Mutual Aid etc. Ass'n v. Houghton*, 98 Ind. 149; 103 Ind. 286; *Supreme Commandery etc. v. Ainsworth*, 71 Ala. 443; *Bolton v. Bolton*, 73 Mo. 299. Except, perhaps, so far as those rules must be deemed to be modified by the peculiar organization, objects, and policy of such associations: *Martin v. Stubbings*, 126 Ill. 387; 9 Am. St. Rep. 620.

The characteristic of the society as an insurance company is not changed by the fact that it requires of each member a deposit as a guaranty of his payment of assessments when made, and that it uses the interest on such deposit, and any forfeited deposit, as far as possible, in lieu of assessments: *State v. Bankers' etc. Ass'n*, 23 Kan. 499. A contract by such an association to pay at certain fixed periods of time certain sums of money, as endowments to living members, or in case of their death to pay certain sums as benefits to their beneficiaries, is life insurance, both as to the endowments and the benefits: *Endowment etc. Ass'n v. State*, 35 Kan. 253. In treating this subject, the court, through Seeverz, J., in *State v. Miller*, 66 Iowa, 26-34, said: "We are satisfied, from an examination of the record, that the primary object and purpose of the association of the Ancient Order of United Workmen is to provide a beneficiary fund to be paid upon the death of each member, and that the avowed fraternal character of the association is merely incidental thereto. In fact, we go further than this, and from the record find that one of two things is true; that is to say, either the fraternal objects of the association as avowed have been abandoned, or they never were intended to be enforced. We find no evidence of their enforcement, or that they were ever regarded as material by the members of the association; while, on the other hand, the provisions in relation to the beneficiary fund have been enforced, and the accumulation and payment of such fund has been regarded as the object and purpose of the association. Therefore it must be regarded as a life insurance organization, and within

the provisions of the statute" relating to life insurance companies. The members of such associations are presumed to contract with reference to the provisions of the charter and by-laws of the society, though they are not recited in the contract or certificate of membership: *Holland v. Taylor*, 111 Ind. 121; *Farmer v. State*, 69 Tex. 561; *Hesinger v. Home Benefit Ass'n*, 41 Minn. 516.

On the other hand, some cases are found which decide that such associations, formed for the purpose of rendering assistance to members or their families in case of sickness, and to insure the payment of a certain sum to widows, heirs, or dependents of deceased members, are not insurance companies, although they require the payment of membership fees, dues, and assessments, to create an endowment fund: *State v. Iowa Mutual Aid Ass'n*, 59 Iowa, 125; *Commonwealth v. National etc. Ass'n*, 94 Pa. St. 481; *Chosen Friends v. Fairman*, 62 How. Pr. 386; *Commercial League Ass'n v. People*, 90 Ill. 166; *State v. Mutual etc. Ass'n*, 26 Ohio St. 19. We think, however, that the better rule is that maintained by the weight of authority, and expressed in *McCorkle v. Texas Benevolent Ass'n*, 71 Tex. 152, as follows: "No reason is perceived why an association such as this, which purports to have been organized for the mutual protection of its members, which acts through its regular officers, under a charter and by-laws, and resorts to assessments on its living members to procure funds to discharge its obligations to its officers and such of its members as may die, should not be governed by the rules of law that are applied to ordinary life insurance companies."

Forfeitures, and Waiver thereof. — As in all other cases, forfeiture of the insurance provided by mutual benefit associations is not favored by the courts. They, in construing the conditions of membership when a forfeiture is claimed, will preserve, if possible, the equitable rights of the holder of the certificate of membership: *Miner v. Michigan Mut. etc. Ass'n*, 63 Mich. 338; *Gunther v. New Orleans etc. Aid Ass'n*, 40 La. Ann. 777; 8 Am. St. Rep. 554; where it is decided, in addition, that if the society has pursued a course of conduct which leads a member to believe that by conforming thereto his rights will be protected, it is estopped from claiming a forfeiture, although incurred under the letter of the contract. Hence, though its charter provides for notice of assessments by posting, yet if it adopts the practice of sending notice by mail, and if, on a particular occasion, it failed to send such notice, and the neglect to pay the assessment was solely due to such failure, and if, as soon as informed, payment was tendered, such estoppel prevails. Or if a mortuary assessment notice is sent to the member by mail, and such notice is not received by him, a forfeiture cannot be insisted upon: *McCorkle v. Texas etc. Ass'n*, 71 Tex. 151. So a forfeiture cannot be insisted upon when the by-laws of the association provide that notice of an assessment shall include a list of all deaths subsequent to the last assessment, and must specify the amount due from the member to the benefit fund, and the notice served is insufficient because it does not include such information, and its service raises no liability on the part of the member to pay the assessment demanded: *Miner v. Michigan Mut. etc. Ass'n*, 63 Mich. 338. Again, where the certificate of membership required the member to pay a certain annual assessment on or before a certain day in each year, and in and by which the member agreed to pay, on the death of a member, an assessment not to exceed a certain sum, and that if such assessments were not received by the association within thirty days from date of notice, the certificate should be null and void, the court decided that, in the absence of notice, no tender of the amount of an assessment was necessary in order to prevent a forfeiture of membership: *Covenant etc. Ass'n*

v. Spies, 114 Ill. 463. If an assessment is not made in accordance with the provisions of the constitution of the order, the beneficiary does not forfeit his membership by neglecting to pay it, no matter whether the assessment was made in accordance with the custom of the order or not, if the member had no knowledge of such custom: *Underwood v. Iowa Legion of Honor*, 66 Iowa, 134.

The acceptance by such societies of assessments after knowledge of a forfeiture by reason of non-payment thereof within the required time operates as a waiver of the forfeiture, in the absence of a contract of the parties to the contrary: *McDonald v. Supreme Council of Chosen Friends*, 78 Cal. 49; *Millard v. Supreme Council*, 81 Cal. 340. So it was again decided that although the association had a right to declare the insurance forfeited on account of failure to pay an assessment, such forfeiture was waived by subsequently, before the death of the assured, receiving and retaining the assessment; and it does not matter that the assessment was demanded and received by mistake, while the intention was to regard the insurance as forfeited: *Bailey v. Mutual Benefit Ass'n*, 71 Iowa, 689; *Tobin v. Western etc. Aid Society*, 72 Iowa, 261, where it is decided, in addition, that such forfeiture may be waived by demanding and receiving an overdue assessment, and subsequently recognizing the member as in good standing, and receiving from him other assessments which he was notified to pay. To the same point is *National etc. Ass'n v. Jones*, 84 Ky. 110-113; *Stylow v. Wisconsin Odd Fellows' etc. Co.*, 69 Wis. 224; 2 Am. St. Rep. 738.

In all cases the burden of proof is on the association to establish a forfeiture by evidence that an assessment was made in the mode pointed out by the charter, otherwise the member is not in default: *Americas etc. Aid Society v. Helburn*, 85 Ky. 1; 7 Am. St. Rep. 571; *Tobin v. Western etc. Aid Society*, 72 Iowa, 261. If the certificate of membership in a beneficiary association provides that it shall become null and void upon the member's failure to pay, — 1. Dues for expenses, payable monthly while it remained in force; 2. The sum due thereon towards the safety fund, within a year from its date; and 3. Duly notified assessments, within a time limited, — a failure to pay monthly dues after the association ceased to do business will not forfeit the certificate, and a payment toward the safety fund, to entitle the member to share therein, may be made at any time within the year, although after suit commenced to recover on the certificate; but the non-payment of an assessment, made before suit was brought, and within the limit, will avoid the certificate: *Burdon v. Massachusetts etc. Ass'n*, 147 Mass. 360. Where a policy of insurance is issued by a mutual benefit society, the terms of which are in conflict with its by-laws, the society must be deemed to have waived its by-laws in favor of the assured; and wherein they are inconsistent with the provisions of the policy, the latter will control the rights of the parties: *Davidson v. Old People's etc. Society*, 39 Minn. 303.

A unique case is that presented by *Dennis v. Massachusetts Benefit Ass'n*, 120 N. Y. 496; 17 Am. St. Rep. 660. There the society issued a certificate to a member, conditioned that it would pay the amount of a death assessment if he complied with its rules and regulations, but a failure to comply therewith, as to payment of assessments, would render the certificate void. It was also provided that notice of assessments should be sent to the last post-office address given by the member, and if the amount was not received within thirty days from the mailing of the notice, this should be taken as sufficient notice that the party had decided to terminate his connection with the association, and the connection would then terminate, and the member's

contract with the society become null and void; but that, for valid reasons to its officers, the member might be reinstated by paying assessments in arrears. One of such reasons was failure to receive the assessment notice. On the 15th of one month, notice of an assessment was mailed to the member, requiring payment on or before the 15th of the next month. On the 8th of the latter month, the member was stricken with apoplexy, and remained unconscious until the 19th, when he died. On the 20th, another notice was received, similar to the first, with the words, "Certificate forfeited for non-payment; may be renewed by immediate payment if in good health," stamped thereon. In an action by the beneficiary to recover the benefit, it appeared that the ground of non-payment was properly presented to the society, and the amount of the assessment tendered, which it refused to accept, and claimed a forfeiture of the certificate. Three prior assessments had not been paid by the member until overdue, when they were accepted, and no other act was required to keep the certificate in force. The court refused to submit the case to the jury, and directed a verdict for the society at its request. The appellate court decided this to be error, and also that the contract must be construed as a promise to accept a valid or sufficient and satisfactory excuse for non-payment, and to continue the certificate in force. The question of the validity of the excuse was not left exclusively to the officers of the society; but when a valid excuse existed, they were bound to be satisfied with it. The facts in this case showed a valid excuse, and the death of the member did not alter the society's contract relations and obligations, while the right to reinstatement passed to the beneficiary under the certificate.

The beneficiary of a member of a benevolent association who stands suspended for the non-payment of assessments by operation of the by-laws of the society, at the time of his death, cannot recover on the benefit certificate on the ground that the subordinate lodge of which deceased was a member had continued to treat him as such, and to treat his unpaid dues to the supreme lodge as dues payable to the subordinate lodge, for which it had extended him credit; and if the by-law of the society makes the non-payment of assessments for a given time after notice operate as a suspension *ipso facto* of the delinquent member, it is not necessary, to prevent his beneficiary from recovering, that the suspension should be judicially determined by any judicatory of the order: *Borgraefe v. Supreme Lodge etc. of Honor*, 22 Mo. App. 127. When a certificate of membership in an aid society provides that it shall be void in case the amount of any assessment is not paid within thirty days from date of notice, a forfeiture may be claimed and payment resisted when assessments have not been paid as required, although assessments had been sometimes accepted after they were delinquent, if the society had no such general custom to that effect as would justify the member in relying upon it, and if he had no knowledge of such practice except in a few instances, in which his own assessments had been received after becoming delinquent: *Bosworth v. Western Mutual Aid Society*, 75 Iowa, 582. This rule, under similar facts, was applied to the non-payment of an assessment overdue at the time of death, in *Crossman v. Massachusetts Benefit Ass'n*, 143 Mass. 435. If a certificate of insurance is issued by an order whose distinguishing feature is its requirement of daily abstinence from the use of liquors as a beverage, and if the application for such insurance contains an agreement that the assured will comply with all the laws, regulations, and requirements of the order, and the certificate a statement that it is issued upon the express condition that the assured shall in every particular, while a member of the order, comply with all its laws, rules, and requirements, the policy becomes forfeited and

void upon the assured commencing the use of alcoholic liquors as a beverage, and his suspension or expulsion from the order is not a condition precedent to the forfeiture: *Hogins v. Supreme Council*, 76 Cal. 109; 9 Am. St. Rep. 173; *Smith v. Knights of Father Mathew*, 36 Mo. App. 184.

A mutual aid association which issues a benefit certificate to a member upon the express condition that it shall be void if any of his answers in his application concerning his health are untrue waives that condition, and cannot insist upon a forfeiture if it had actual knowledge that some of his answers were not true, and subsequently recognized the certificate as valid by making and collecting assessments upon it: *Ball v. Granite State etc. Ass'n*, 64 N. H. 291.

The levy and acceptance of assessments by a beneficiary association without condition after the conditional acceptance of a prior overdue payment always amounts, as we have seen, to a waiver of the right to avoid a certificate of membership for delay of payment: *Rice v. New England Mutual Aid Society*, 146 Mass. 249; *Rindge v. New England Mutual Aid Society*, 146 Mass. 286. But mere occasional voluntary indulgences on the part of the society, in the absence of agreement to waive payment of assessments according to the contract, will not be construed a permanent waiver: *Sweeter v. Odd Fellows' etc. Ass'n*, 117 Ind. 97.

Beneficiaries—Designation, Change, and Rights of.—The statute of the state, articles of association, certificate of membership, and by-laws of a mutual benefit association determine the rights of the members and the society; and may be enforced by the parties and beneficiaries according to their respective rights as therein provided: *Union Mutual Ass'n v. Montgomery*, 70 Mich. 587; 14 Am. St. Rep. 519; *Arthur v. Odd Fellows' etc. Ass'n*, 29 Ohio St. 557; *Supreme Council v. Green*, 71 Md. 263; 17 Am. St. Rep. 527. And where the statute designates the class of persons to be benefited, the association cannot create a fund for other persons than the class named: *Supreme Lodge v. Nairn*, 60 Mich. 44. So if a member does not designate as his beneficiary one of such class during his lifetime, it will still go to one of that class upon his death: *American Legion v. Perry*, 140 Mass. 580.

In determining whether or not the designated beneficiary comes within a specified class or not, the charter and by-laws of the association will be liberally construed, so as to carry out the purposes of the society, but not so as to violate the statute or contravene public policy: *Knights of Pythias v. Schmidt*, 98 Ind. 374; *American Legion v. Perry*, 140 Mass. 580; *Mancely v. Knights of Birmingham*, 115 Pa. St. 305; *Elsey v. Odd Fellows' etc. Ass'n*, 142 Mass. 224.

The designation of the beneficiary must be made in the mode provided: *National etc. Aid Society v. Lepold*, 101 Pa. St. 111; *Elliott v. Whedder*, 94 N. C. 115; and a person not of a class for whose benefit the association is authorized cannot be designated as a beneficiary: *Michigan etc. Ass'n v. Rolfe*, 76 Mich. 146; *Mutual Benefit Ass'n v. Hoyt*, 46 Mich. 473; *National etc. Aid Ass'n v. Gonser*, 43 Ohio St. 1; *Britton v. Supreme Council*, 46 N. J. Eq. 102; *ante*, p. 376; *Keener v. Grand Lodge A. O. U. W.*, 38 Mo. App. 543.

Either the statutes of the state, or the charter or by-laws of mutual benefit societies, usually provide that the fund is established for the benefit of the widows, children, orphans, relatives, or dependents of deceased members; and where such provision is made, the beneficiary designated must be one of the class mentioned, and not a creditor or other person not related to the deceased member: *Worley v. Northwestern etc. Aid Ass'n*, 10 Fed. Rep. 227; *Elsey v. Odd Fellows' etc. Ass'n*, 142 Mass. 224; *State v. People's etc. Ass'n*, 42 Ohio St. 579; *State v. Standard etc. Ass'n*, 38 Ohio St. 281; *Van Bibber v.*

Van Bibber, 82 Ky. 347; *Presbyterian etc. Ass'n v. Allen*, 106 Ind. 593; *Shillings v. Massachusetts etc. Ass'n*, 146 Mass. 217; and cases in preceding citation. Thus, under a statute containing such provision as that mentioned above, an attempt by a member to name as his beneficiary a person designated as his niece, when in fact they were not related, will fail; and an agreement between the parties to act as uncle and niece will not have the effect to make them such, and bring her within the class named in the statute as relatives, so as to make her a qualified beneficiary: *Supreme Council v. Green*, 71 Md. 263; 17 Am. St. Rep. 527. The beneficiary of the fund must be of the class named in the law under which the society is organized, and neither the term "families" or "dependents" includes one knowingly occupying the relation of mistress or concubine, though named in the member's certificate as bearing the relation of wife, and although he may have supported her, and she depended upon him for support: *Keener v. Grand Lodge*, 38 Mo. App. 543. So an army comrade and intimate friend of a member, who had lived at his house for several years, had become physically disabled, and dependent upon others for support, does not fall fairly within the designation of "family relations," and cannot therefore be legally named as a beneficiary: *Supreme Lodge v. Nairn*, 60 Mich. 44.

A sister of a member, or a person to whom he is engaged to be married, cannot be said to be dependent upon him so as to entitle either to his benefit: *Supreme Council v. Perry*, 140 Mass. 580. So where the certificate in a beneficiary society stated that it was for the benefit of "friends," but provided, in case no beneficiaries, original or substituted, survived, that it should inure to the benefit of "legal heirs," though the designation of friends is void, still the legal heirs are entitled to the benefit: *Rindge v. New England etc. Soc.*, 146 Mass. 286. If the applicant designated his mother as his beneficiary, and afterwards married, his wife surviving him, it was decided that the designation of such beneficiary was binding on the association, and not revoked by the marriage: *Massachusetts etc. Foresters v. Callahan*, 146 Mass. 391. So where a member of such society designated his "legal heirs" as his beneficiaries, and left a wife and daughter surviving, the fund is payable to his widow: *Addison v. New England etc. Ass'n*, 144 Mass. 591. If the certificate names the wife of the member as his beneficiary, "for the benefit of herself" and the children of said member, the widow and such children are entitled to share equally in the benefit, although one child had left her father's house prior to his death, and was no longer dependent upon him: *Jackman v. Nelson*, 147 Mass. 300. When the by-laws provide that, at the death of a member, his widow or designated heirs shall receive his benefit, and his certificate provides that it shall be paid to his wife, naming her, or to such other person as may be entitled to receive the same, the death of the first wife and the member's subsequent marriage will revoke the original designation, and entitle the second wife to the benefit, to the exclusion of the member's children by his first wife: *Riley v. Riley*, 75 Wis. 464; *Given v. Wisconsin Odd Fellows' etc. Co.*, 71 Wis. 547. If a member nominates his wife to receive, at his death, his benefit accruing under the charter of the society to his legal representatives, if he survives her, his legal representatives will take as against hers: *Expressman's Aid Soc. v. Lewis*, 9 Mo. App. 412.

Where the certificate of a member certifies that, in accordance with the by-laws and charter of the association, his wife, naming plaintiff, is designated as his beneficiary, and she, with knowledge of such designation, paid most of the assessments against him, payment cannot be resisted on the

ground that the member had another wife living at the time he married plaintiff, for as the by-law did not limit the power of the society so as to prevent it from recognizing as a beneficiary the person designated by the member as his wife, the certificate operated as an assent on its part to such designation, and entitled plaintiff to the benefit, in the absence of any other appointment or repudiation of the arrangement made: *Story v. Williamsburgh etc. Ass'n*, 95 N. Y. 477.

A member of a benefit society, pending an action for divorce, nominated a lady to whom he was engaged to be married as his beneficiary, and she, upon learning of the divorce proceeding, dissolved the engagement, and the member, after securing his divorce, married another lady, who never had the certificate, and about three years after her marriage, the certificate having become lost, the member applied for its reissue, naming his son and another, not a relative, as his beneficiaries, and disclaiming any interest in the original certificate. Under the rules of the society, the member had a right to change his beneficiary without her knowledge or consent. Both the first-named beneficiary and the son claimed the benefit, and the court decreed that it be paid to the son as sole heir at law: *Grand Lodge v. Child*, 70 Mich. 163.

Where the charter of a society provided that on the death of a member "the fund to which his family is entitled shall be paid as designated in application for membership, and this being changed by death, or otherwise impossible, it shall go, first, to the widow and infant children," and then to others in order named. A member, in his application, directed that the sum should be paid as specified in his will. He died, however, without leaving a will, but leaving surviving him a widow, but no child. The court decided, as between his administrator and widow, that the latter was entitled to the fund: *Whitehurst v. Whitehurst*, 83 Va. 153.

When, under the charter of an association, a member may take out a certificate and bequeath the benefit to a stranger, he may have such benefit made payable to the proposed beneficiary directly, instead of doing the same thing by appointment in his will: *Bloomington etc. Ass'n v. Blue*, 120 Ill. 121. If, under such a charter, a member takes out his certificate payable to his "devisees or heirs at law," if he executes a will bequeathing the fund to persons named in the will, they will take; but if he dies intestate, without issue, the fund will go to his widow, to the exclusion of all others: *Alexander v. Northwestern etc. Ass'n*, 126 Ill. 558.

In Pennsylvania, a rule different from that set out above is maintained. There an association was formed for the purpose of establishing a fund for the benefit of the "widows and orphans of deceased members," and its by-laws provided that a member's benefit should be paid to such person as he might designate. A member borrowed the amount of his benefit from his sister, who paid his dues and assessments, and he designated her as his beneficiary. In a controversy between the widow of the member and his sister, the court determined that the benefit must be paid to the latter, as there was nothing to prohibit the corporation from contracting with the member for the payment of the benefit to other persons than his widow and orphans: *Manely v. Knights of Birmingham*, 115 Pa. St. 305. Of course, where there is nothing in the statute of the state, the charter, or by-laws of the organization restricting the power of appointment, the member may designate whomsoever he pleases as his beneficiary, and no one can question his right to do so: *Gentry v. Supreme Lodge*, 23 Fed. Rep. 718; *Mitchell v. Grand Lodge*, 70 Iowa, 360; *Mussey v. Mutual Relief Society*, 102 N. Y. 523; *Swift v. Railway*

etc. Ass'n, 96 Ill. 309; *Knights of Honor v. Nairn*, 60 Mich. 44; *Bayse v. Adams*, 81 Ky. 368. Under these circumstances, perhaps the only restriction placed upon the member is, that his beneficiary must have an insurable interest in his life: *Keystone etc. Ass'n v. Norris*, 115 Pa. St. 446; *Mutual Benefit Ass'n v. Hoyt*, 46 Mich. 473; *Whitmore v. Supreme Lodge*, 100 Mo. 36. This, however, is a mooted question, and good authority is found maintaining that, as the member has an insurable interest in his own life, he may make his benefit payable to any one whom he may appoint, although the latter has no pecuniary interest in the continuance of the life of the member, and is not of kin to him: *Bloomington etc. Ass'n v. Blue*, 120 Ill. 121; *Milner v. Bowman*, 119 Ind. 449. And see the discussion *infra*, on the right of the member to assign his benefit.

On failure of a member to designate a valid beneficiary, his benefit will go to the parties named in the charter and by-laws of the association as beneficiaries, in the order therein named: *Keener v. Grand Lodge*, 38 Mo. App. 543; *Arthur v. Odd Fellows' etc. Ass'n*, 29 Ohio St. 557; *Bishop v. Grand Lodge*, 112 N. Y. 627; *Supreme Council v. Priest*, 46 Mich. 429; *Maryland etc. Society v. Clendinen*, 44 Md. 429. On a failure of the member to designate a beneficiary capable in law of taking his benefit, and where there is no one who, under the statute, charter, or by-laws of the association, is capable of taking at his death, the association is under no obligation to pay to any one: *Hellenberg v. District No. 1, I. O. of B. B.*, 94 N. Y. 581; *Eastman v. Provident etc. Ass'n*, 62 N. H. 555; *Swift v. San Francisco etc. Board*, 67 Cal. 567; *Order of Mutual Companions v. Griest*, 76 Cal. 494. All of these cases maintain that a member of the society has no interest in the fund, and that it cannot be recovered as assets of his estate by his administrator. He has simply the power of appointment, and only those can become beneficiaries whom he has appointed, or who, under the charter and by-laws of the association, are entitled to his benefit upon his death.

The beneficiary appointed by the holder of a certificate in a mutual benefit association, payable on his death according to his direction, acquires only a contingent interest in the benefit, if the statute, charter, or by-laws of the society reserves to members the power of substituting other beneficiaries in the place of those originally named. In other words, the nomination of a beneficiary gives him no vested right to the benefit, and the member may at any time substitute another person or class of persons, unless restrained by the rules of the society: *Holland v. Taylor*, 111 Ind. 121; *Knights of Honor v. Watson*, 64 N. H. 517; *Barton v. Provident etc. Ass'n*, 63 N. H. 535; *Martin v. Stubbings*, 126 Ill. 387; 9 Am. St. Rep. 620; *Union Mut. Ass'n v. Montgomery*, 70 Mich. 587; 14 Am. St. Rep. 519; *Titsworth v. Titsworth*, 40 Kan. 571; *Milner v. Bowman*, 119 Ind. 448; *Masonic etc. Society v. Burkhardt*, 110 Ind. 189. Where the constitution of the association permits the member to designate a new beneficiary, the party first named cannot prevent this: *Lamont v. Grand Lodge*, 31 Fed. Rep. 177; as his consent to a change of beneficiary is not required: *Union Mut. Ass'n v. Montgomery*, 70 Mich. 587; 14 Am. St. Rep. 519. It makes no difference that the person last designated is outside the member's family, and has no insurable interest in his life: *Lamont v. Grand Lodge*, 31 Fed. Rep. 177; *Lamont v. Hotel Men's etc. Ass'n*, 30 Fed. Rep. 817.

Upon the death of a member, the interest of the last designated beneficiary becomes vested, and he may compel the payment of the benefit by assessment, or such other means as are provided him by law or the charter and by-laws of the society: *Union Mut. Ass'n v. Montgomery*, 70 Mich. 587; 14

Mut. etc. Society v. Burkhart, 110 Ind. 189. The only restriction upon the power of the member to change his beneficiary at will is such as is found in the statute, charter, or by-laws of the society. The change must be made in the manner designated in such provisions, or it will be void: *Wendt v. Iowa Legion of Honor*, 72 Iowa, 682; *Martin v. Stubbs*, 126 Ill. 387; 9 Am. St. Rep. 620; *Holland v. Taylor*, 111 Ind. 121; *National Ass'n v. Kirgin*, 28 Mo. App. 80; *Richmond v. Johnson*, 28 Minn. 447. The mode agreed upon in the contract of membership by which the beneficiary may be changed is a matter of substance, and must be complied with: *National etc. Aid Society v. Lupold*, 101 Pa. St. 111; *Gentry v. Supreme Lodge*, 23 Fed. Rep. 718; *Hotel Men's etc. Ass'n v. Brown*, 33 Fed. Rep. 11; *Olmstead v. Masonic etc. Society*, 37 Kan. 93.

The laws and regulation of the society determine the rights of the parties and of the beneficiary, and become part of the contract, the same as if written in the certificate: *Holland v. Taylor*, 111 Ind. 121; *Union Mut. Ass'n v. Montgomery*, 70 Mich. 587; 14 Am. St. Rep. 519; *Arthur v. Odd Fellows' Ass'n*, 29 Ohio St. 557; *Oceola Tribe Red Men v. Schmidt*, 57 Md. 106. And where the member reserves the right to change his beneficiary, the law will respect any change which he may make in pursuance of his rights: *Barton v. Provident etc. Ass'n*, 63 N. H. 535; *Richmond v. Johnson*, 28 Minn. 447; and it will be presumed that the change of beneficiary was made as provided by law and the rules and regulations of the society: *Masonic etc. Society v. Burkhart*, 110 Ind. 193; *American Legion of Honor v. Perry*, 140 Mass. 580.

If a member becomes suspended for non-payment of assessments, he may, in his application for reinstatement, designate a new beneficiary, and the association, by readmitting him, accepts the change: *Davidson v. Supreme Lodge*, 22 Mo. App. 263. A member may change his beneficiary from his wife to his mother under a late statute in Massachusetts: *Marsh v. Supreme Council*, 149 Mass. 512; although a contrary rule formerly existed: *Elsay v. Odd Fellows' etc. Ass'n*, 142 Mass. 224; or he may make such change from a deceased wife to his second wife: *Millard v. Legion of Honor*, 81 Cal. 340. But the beneficiary cannot be changed when the charter specially provides how and to whom the benefit shall be paid: *Presbyterian etc. Fund v. Allen*, 116 Ind. 593. Thus, though a divorced wife, by obtaining the divorce, would lose her right as beneficiary by designation, still an attempt by the member to change the beneficiary by designating his sister and son as beneficiaries would be void as to the sister, and the son would take the entire benefit: *Tyler v. Odd Fellows' etc. Ass'n*, 145 Mass. 134. When particular provision is made as to the manner in which a change of beneficiaries must be effected, or to whom the benefit must go upon a failure of nomination, an attempted change of designation of beneficiary by last will is void, and the fund will go to the persons provided by the regulations of the society: *Supreme Council v. Perry*, 140 Mass. 580; *Holland v. Taylor*, 111 Ind. 121; *Olmstead v. Masonic etc. Society*, 37 Kan. 93; *Wendt v. Iowa Legion of Honor*, 72 Iowa, 682; *Stephenson v. Stephenson*, 64 Iowa, 534; *Hainer v. Iowa Legion of Honor*, 78 Iowa, 245.

ASSIGNMENT OF BENEFIT. — Where a member of a benefit association has a right to change the beneficiary named in the certificate of membership, and no prescribed method of making the change is shown, an assignment of the certificate, with a direction to the society to pay the benefit to the assignee, effects a change, and is valid.

Every one has an insurable interest in his own life, and when he procures

a certificate for himself, and pays the assessments, it is immaterial whether or not the beneficiary designated by him, or the assignee, has an insurable interest in his life: *Milner v. Bowman*, 119 Ind. 448; *Martin v. Stubblings*, 126 Ill. 387; 9 Am. St. Rep. 620; *Swift v. Railway Passengers' etc. Ass'n*, 96 Ill. 309; *Lamont v. Association*, 30 Fed. Rep. 817; *Lamont v. Grand Lodge*, 31 Fed. Rep. 180; *Grand Lodge v. Elmer*, 26 Mo. App. 118. This rule remains applicable, though a by-law of the society provides that no certificate shall issue unless the beneficiary has an insurable interest in the life of the member: *McFarland v. Creath*, 35 Mo. App. 112. In some states, however, a different rule prevails. In them it is considered a wager-policy, and against public policy, to allow any one not related by blood or otherwise, nor a creditor of the member, and therefore having no insurable interest in his life, to become the owner, by assignment or otherwise, of the certificate which entitles the beneficiary to the member's benefit upon the event of his death: *Schonfeld v. Turner*, 75 Tex. 324; *Price v. Knights of Honor*, 68 Tex. 367. Even in these states, a creditor of a member may lawfully become the owner of a right to the benefit to an extent requisite to protect him against ultimate loss of his claim, and so a purchaser or assignee of it will be recognized as having an interest therein sufficient to repay him his purchase-money invested in it, including advancements in the way of assessments, dues, and premiums to preserve and keep the certificate in force, with lawful interest: *Schonfeld v. Turner*, 75 Tex. 324. A certificate of membership on the life of one, taken by another, who has an insurable interest therein, for the purpose of assigning it to a third person, who has no such insurable interest, makes the certificate in the hands of such assignee a wagering policy, upon which an action cannot be maintained: *Keystone etc. Ass'n v. Norris*, 115 Pa. St. 446. A certificate of membership in a benefit association is in the nature of an insurance policy, and its assignment or transfer to a creditor of the beneficiary, except to the amount of his debt, is against public policy, and cannot be enforced. Yet if the assignment is not forbidden by the rules of the society, and its validity is recognized by the association after the death of the beneficiary, by payment of the money to the assignee, the heirs of the deceased beneficiary cannot complain: *Stoelker v. Thornton*, 88 Ala. 241.

In *Bryne v. Casey*, 70 Tex. 247, on the face of the benefit certificate it appeared that the wife of a member, whose name was mentioned therein as beneficiary, was not a party to the contract with her husband, evidenced by it. It was subject to be surrendered by the rules of the society, which were after its issuance amended so as to permit a surrender of the certificate without the consent of the beneficiary. Subsequently the original certificate was surrendered by the member and another issued to him, who, prior to his death, assigned the new certificate for a full consideration without fraud, and the court decided that the wife was not thereby deprived of any legal rights; that her ignorance of the surrender of the original certificate and failure to give assent thereto were immaterial; and that not being a party to the original certificate, she could not complain of the change of the rules of the association, and that the assignee was therefore entitled to recover.

Associations formed for the payment of stipulated sums of money to the families or heirs of deceased members are not empowered to issue certificates of membership payable to named beneficiaries, "or assigns," nor payable upon death of the member to others than the family or heirs of the member: *State v. People's etc. Ass'n*, 42 Ohio St. 579. Upon the death of the member, the interest of the beneficiary in the benefit fund becomes vested, and such beneficiary can assign the same at any time before payment: *Michigan Mutual etc. Ass'n v. Rolfe*, 76 Mich. 146.

ALFF & Co. v. RADAM.

[77 TEXAS, 530.]

TRADE-MARK. — WHAT CONSTITUTES A TRADE-MARK IS A QUESTION OF LAW for the court. Whether a trade-mark has been so constituted, and if so constituted whether there has been an infringement of it, are ordinarily questions of fact for the jury.

TRADE-MARK — WHAT CONSTITUTES, AND RIGHT OF OWNER. —The owner of an original trade-mark will be protected in the exclusive use of all marks, forms, or symbols appropriated as designating the true origin or ownership of the article to which they are affixed. But he has no right to the exclusive use of any words, letters, figures, or symbols which have no relation to the origin or ownership of the goods, and are only meant to indicate their names or quality. He has no right to appropriate a sign or symbol which, from the nature of the fact it is used to signify, others may employ with equal truth, and therefore have an equal right to employ for the same purposes.

TRADE-MARK. — WORDS IN COMMON USE are common property, and no exclusive right to the use of such words can be acquired by adopting them as a trade-mark, unless they are used in an arbitrary or fanciful sense, and not in their ordinary signification.

TRADE-MARK. — WORDS “MICROBE KILLER,” used in their ordinary and not in any arbitrary or fanciful sense, cannot constitute a trade-mark.

FRAUD — IMITATION OF LABEL. —Although a peculiar device on labels adopted by one may not constitute a trade-mark, still if it is imitated by another in a way calculated to deceive and does deceive ordinarily prudent persons, they, and the one whose label is imitated, are entitled to protection; but when the labels are so entirely dissimilar as not to deceive such persons, no action will lie for fraudulent imitation.

Walton, Hill, and Walton, for the appellants.

Dowell and Posey, for the appellees.

ACKER, P. J. William Radam brought this suit against Charles Alff & Co., a firm composed of Charles Alff and Joe K. Heim, and against the members of the firm individually, to recover damages for alleged infringement of a trade-mark, and for injunction restraining the defendants from using the alleged infringing trade-mark.

The trial by jury resulted in a verdict for plaintiff for one cent damages, and judgment was rendered perpetuating the injunction, from which the appeal is prosecuted.

The alleged trade-mark of plaintiff consisted of the words “Microbe Killer,” used in conjunction with a device, symbol, or illustration representing a man in the attitude of striking a human skeleton with a bludgeon. The words and illustration are printed on a white paper label eight and a half by five and a half inches in dimensions, with a red border around it, the

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Words in common use are common property of the people, and no exclusive right to the use of such words can be acquired by adopting them as a trade-mark, unless they be used in an arbitrary or fanciful sense, and not in their ordinary signification: Browne on Trade-Marks, sec. 161; *Filley v. Fassett*, 44 Mo. 169; 100 Am. Dec. 279.

On the trial the plaintiff testified that the words "Microbe Killer" mean fungus destroyer; that the word "microbe" was intended to signify fungus; that in using the name "Microbe Killer" he intended to convey the meaning that it kills those things, and that the name "Microbe Killer" means destroyer of microbes.

That the words are English words in common use, of known signification and fixed meaning, we think there can be no doubt, and that they were employed by the plaintiff in their ordinary and not in any arbitrary or fanciful sense is shown beyond question by the testimony of the plaintiff himself. Under the authorities *supra*, we think it quite clear that the words "Microbe Killer" as used by the plaintiff did not constitute a trade-mark.

Notwithstanding plaintiff has no real or legal trade-mark, if the defendants had intentionally simulated the peculiar device or symbol employed by plaintiff on his labels, and such simulation was calculated to deceive ordinarily prudent persons, and did deceive such persons, the plaintiff would be entitled to protection against the consequences of such deception, not because of his device or symbol being a trade-mark in the legal sense of that term, but because of the fraud and deception practiced by the defendants upon the plaintiff and the public.

In this case, however, the labels used by the plaintiff and defendants respectively are so entirely dissimilar that we do not think it possible for any person of ordinary prudence and caution to have been deceived by defendants' label and thereby induced to buy their remedy when the purchaser desired and intended to buy the plaintiff's remedy.

Other assignments of error are immaterial, and will not be discussed, as what we have said disposes of the case.

We are of opinion that the judgment of the court below should be reversed, and judgment rendered here that appellee take nothing by his suit, and that he pay all costs of this and of the court below.

On petition for rehearing, the following opinion was rendered:—

STAYTON, C. J. Judgment having been rendered in accordance with the opinion of the commission of appeals, both parties, in effect, ask that the judgment be so reformed as to remand the cause for further proceedings.

Appellants desire this to enable them to prosecute their cross-bill for damages; and appellee suggests that he may be able to offer further evidence on another trial tending to show that his right has been infringed, even if it be true that the words "Microbe Killer" may not constitute a trade-mark.

Without in any respect qualifying the former opinion as to the law of the case, the former judgment will be set aside, and a judgment here entered reversing the judgment of the court below and remanding the cause for further proceedings.

TRADE-MARKS. — As to what constitutes a trade-mark, and the rights of the owner thereof, see *Caswell v. Hazard*, 121 N. Y. 484; 18 Am. St. Rep. 833, and note; *Cigar Makers' P. Union v. Conhaim*, 40 Minn. 243; 12 Am. St. Rep. 726, and note; *Keller v. Goodrich*, 117 Ind. 556; 10 Am. St. Rep. 83, and note; *Russia Cement Co. v. Le Page*, 147 Mass. 206; 9 Am. St. Rep. 685, and note 683, 689; *Metcalfe v. Brand*, 86 Ky. 331; 9 Am. St. Rep. 282, and note.

INTERNATIONAL AND GREAT NORTHERN RAILWAY COMPANY v. PRINCE.

[77 TEXAS, 660.]

MASTER AND SERVANT — LIABILITY OF RAILROAD COMPANY FOR ACT OF VICE-PRINCIPAL. — A train-master who has control of all trains, employees, and everything which goes upon the track on his division, has such relation to the railway company that he is deemed its representative; and if he violates rules made for the government and protection of employees, by inviting third persons to ride on hand-cars, thus placing them, while they are ignorant of such rules, in a position where they are injured by the negligence of the company's servants, the company must respond in damages for the injury thus resulting.

WHILE AGENCY CANNOT BE PRESUMED from the fact that one assumes to do some act in that character, yet where the fact of agency is established,

the power which the agent actually exercises in his principal's business, and over other employees to which they constantly yield obedience, may be looked to as evidence of the actual power possessed by the agent.

RAILROAD COMPANY MUST EXERCISE ORDINARY AND REASONABLE CARE for the safety of a passenger lawfully on its hand-car.

INSTRUCTIONS INVOLVING ABSTRACT PROPOSITIONS are properly refused, especially when the charges given fairly present the case to the jury.

PRACTICE — DEPOSITION. — **OBJECTION** to the manner and form of taking a deposition must be made at the time the deposition was taken. Such objection cannot be made for the first time at the trial.

W. O. Hutchison and B. B. Rose, for the appellant.

Denman and Franklin, and O. T. Brown, for the appellee.

STAYTON, C. J. This case was before this court at a former term: 64 Tex. 144. The holding then was that the petition stated a cause of action, and although there are other questions now presented, the main inquiry now is, whether the evidence supports the averments of the petition.

When injured, appellee was riding on a hand-car, which the evidence shows was against the rules of the company, such cars being intended only for the transportation of employees, tools, and such other things as were necessary to be used on the road.

The petition alleged, in effect, that the company was not accustomed to transport passengers on its hand-cars, but that on the occasion when appellee was injured it did invite him and others to take passage on its hand-car for the purpose of reaching a place on the road where a dead person had been found, to which place the persons so received on the car were going to hold an inquest, which the company for its own vindication desired should be held.

Appellee further alleged that he went on the car at the invitation of the company; that the car was operated and managed by appellant's servants, through whose negligence he was injured.

The evidence shows that it was a violation of the printed rules of the company to transport others than employees on hand-cars, but does not show that appellee was aware of that rule.

On the morning of the day on which the accident occurred, one Hume, who was train-master on that part of appellant's road, sent a telegram to the section-foreman of that section, directing him to take the coroner and his jury to the place where the dead body was found; and there can be no doubt

but that he expected this to be done on hand-cars of which the section-foreman had the immediate control.

The testimony of Hume is to the effect that he had no right or power derived from appellant to direct the use of its hand-cars for the purpose for which he did direct them to be used. His evidence as well as that of the road-master tends to show that he had general control of all trains engaged in transportation of passengers or freight, but that he had no right to control hand-cars, which were for the use of employees of the company only, and under the control of the road-master.

A witness who seems to have been in the employment of appellant at time appellee was injured stated that he was "familiar with the duties of a railroad train-master. He has control of all trains on his division; he regulates everything that goes on the track on his division. His position is superior to that of train-dispatcher; he has control of all trains run on his division. In the absence of a division superintendent he has the authority of such superintendent, and has control of everything on his division. I do not think that there was any division superintendent on the Laredo and Taylor division when Mr. Prince was hurt by the hand-car."

Another employee stated that "Hume, as said train-master, had exclusive control of his section as to other employees on the road, and the general management of the road as to said subdivision, to wit, from Taylor to Laredo. All employees were subject to his orders on said section."

Another employee, after stating that Hume had directed him to have the inquest held and to use hand-cars in transporting the coroner and jury, said: "Hume was train-master of this division, and as such was my superior, and directed me to do what I did in this matter. At that time there was no division superintendent, but a division train-master, Mr. Hume. Mr. Hume, as train-master of this division, had general control of all employees on this division. When I want anything I apply to Mr. Hume, and in general communicate with him about all things, except when we are sued, in which event I communicate with the law department."

Under this state of facts, it is contended that the evidence was not sufficient to justify a finding that Hume had authority to use the hand-cars for transporting the coroner and his jury to the place where the body was found on the track.

We are not prepared to hold that the evidence did not justify a finding that Hume had authority to use the hand-cars as

they were used, for it tends to show that he was the representative of the company on that part of its road in respect to all matters connected with its use of its road, cars of all kinds, and the services of its employees.

A person having such a relation to a corporation and to its business must with reference thereto be deemed its representative, and his act the company's act.

If he violates rules made for the government and protection of employees, and thus places persons ignorant of such rules in position where they are injured by the negligence of the company's servants, it must respond in damages for the injury thus resulting.

The question of extent of Hume's power was fairly submitted to the jury, and with the evidence before them, their verdict must be deemed conclusive of the question.

While the fact of agency cannot be presumed by the simple fact that one assumes to do some act in that character, yet where the fact of agency is established, the power which the agent actually does exercise in his principal's business, and over other employees to which they constantly yield obedience, may be looked to as evidence of the actual power possessed by the agent.

The charge of the court did not require of appellant the exercise of that degree of care which it is necessary the carrier of passengers in vehicles intended for that purpose shall use, but informed the jury that appellant would be liable only in the event appellee was lawfully on the car, and while there injured by the failure of servants of appellant to use ordinary or reasonable care.

The court further informed the jury that appellant would not be liable if the injury complained of resulted from the act of a fellow-passenger or from unavoidable accident.

The evidence tends to show that the hand-car was running at an unusually rapid speed when the accident occurred, and that a temporary resting-place for the legs or feet of those sitting on the front part of the car, improvised for the occasion, gave way, and that appellee and others thereon sitting were thus caused to fall in front of the car, from which they received injuries.

There was also some evidence tending to show that the act of one not a servant of appellant may have caused the accident. What the real cause was was for the determination of the jury, as was it for them to determine whether the injury

resulted from the negligence of the servants of appellant. The jury may have come to the conclusion that the arrangement for seating appellee and others who were going to the inquest was not such as under the circumstances ordinary prudence demanded, and that this caused the accident, and if so, we cannot say that there was not evidence to sustain such a finding.

We know from the evidence that the rest for the legs or feet of those seated on the front of the car gave way, and caused those there sitting to fall before the moving car, and that it did fall is some evidence that it was not properly placed or secured, which, in the absence of some evidence that it could not have been well secured consistently with the proper use of the car, the jury was authorized to look to on the question of negligence or not.

Being lawfully on the hand-car, it was the duty of appellant to exercise at least ordinary care for the safety of appellee: *Whitehead v. St. Louis etc. R'y Co.*, 99 Mo. 263.

The charges requested which were intended to inform the jury as to the facts which would not have conferred on Hume authority to transport the coroner and jury on hand-cars, and as to the effect of his directing this to be done if this was in excess of his power, were but abstract propositions, more likely to mislead the jury under the evidence than to give them a correct view of their duties, and were properly refused, and especially so in view of the fact that the charges given by the court fairly presented the questions in the case to the jury.

An interrogatory propounded to a witness whose testimony was taken by deposition was as follows: "Please state any other fact or facts within your knowledge regarding the matter the same as if directly questioned about it"; and without objection made before the trial the answer to this interrogatory was objected to on the ground that it was general, and did not tend to elicit any particular fact or facts.

The objection was one that went to the manner and form of taking the deposition, and to have been available should have been urged in proper time and manner. Such objections cannot be made for the first time during the trial.

The answer, however, did not state a single fact that was not proved by most of the witnesses; i. e., that the section-foreman took the coroner and jury out on the hand-cars, and that appellee was hurt.

on which the coroner and jury were taken out, the operator who received the telegrams was permitted to state the message, which in no material respect differed from the copy filed. There was no error in admitting this evidence, but had there been, no injury could have resulted, as it related to a matter about which there was no controversy.

The cause having been fairly submitted to the jury on evidence which cannot be said to be insufficient to sustain the verdict, the judgment must be affirmed.

THE CASE OF *Gulf etc. Ry Co. v. Dawkins*, 77 Tex. 228, was an appeal from a verdict and judgment for five thousand dollars in favor of the appellee, Dallas Dawkins. One Hennessey, who had charge of a section of appellant's road, was going to a place called Brownwood on a hand-car belonging to appellant, to get and carry to Mrs. Dawkins, the mother of the appellee, some property belonging to her; and the appellee, a boy seven years of age, was taken along, with the consent of his mother, to point out the property. On the way, from some unexplained cause, the appellee was thrown from the car and injured. This hand-car was provided by the appellant for the purpose of carrying its employees and their tools to and from work, and for no other purpose. The employees of appellant who had charge of the hand-car had frequently used it as a means of conveyance to Brownwood when going hither upon their own business, and they had often allowed persons not connected with the company to ride upon it, notwithstanding the rules of the appellant forbade its being used for the transportation of passengers, nor were passenger fares ever received for such transportation.

Appellant complained of the following charges given by the court:

1. That it must appear from the evidence that plaintiff had notice of defendant's rules against passengers being carried on the hand-car.
2. That the defendant would be bound by the acts of its servants done within the scope of its apparent authority.
3. That 'when a railroad company has adopted rules forbidding the use of certain cars by passengers, but by consent of officers or agents authorized to give consent they are habitually disregarded, the jury are authorized to take such action of said company into consideration in determining whether or not such rules have been abandoned or relaxed by the company.'

The supreme court declared that these charges were not warranted by the facts proved. Appellant was not engaged in carrying passengers on the hand-car, and the appellee did not occupy that relation to the appellant, while the effect of the charge was to make the appellee's ignorance of appellant's rules constitute him a passenger.

Instead of the charges given, the following instructions, asked by the appellant, should have been given: "The burden of proof is on the plaintiff to show by a preponderance of evidence that at the time of the negligent acts complained of the foreman and section-men were acting within the scope of the authority conferred upon them by the defendant. If you believe from the evidence that at the time of the accident to the plaintiff the section-foreman and the section-men were not engaged in performing any work of the defendant or discharging any duty in the defendant's service, but that they

were going to Brownwood on private business of their own and of Mary Dawkins, in which private business the defendant company had no interest or concern, and that the trip of the hand-car in question was exclusively for the purpose of transacting such private business, then you are instructed that Hemmewey and the section-men were not acting in the scope of their employment, and that defendant is not liable for the negligence complained of, and you will find for the defendant."

Although if the appellee had sustained the relation of passenger to the appellant, his tender years would have excused him from the effects of his own contributory negligence, still his age cannot have the effect of creating that relation. This case is clearly distinguishable from that of *Prince v. International etc. Ry Co.*, 64 Tex. 144, where the court decided that if a railroad company "has 'no regulations against traveling on a hand-car, and the agents in charge of it violate no orders when they permit persons to travel on it, and it is sometimes used for the transportation of passengers invited by proper agents to travel upon it,' the corporation will be liable for injuries to a person riding as a passenger upon one, notwithstanding that mode of carrying passengers may not be in general use by it." For the reason given, the case was reversed and remanded.

NOLAN v. MENDERE.

[77 TEXAS, 865.]

PARTY-WALLS — RIGHT OF ADJOINING OWNER TO USE. — The owner of a town or city lot is not liable to the owner of an adjacent wall, when he merely avails himself of it as part of the inclosure of his premises. If his structure is not in any manner attached to nor supported by the wall, and it is not in any manner injured, he is not liable for its use.

Hare, Edmonson, and Hare, for the appellant.

W. M. Peck and W. W. Wilkins, for the appellee.

GAINES, A. J. The appellant and appellee were owners of adjacent lots in the city of Denison. Before the commencement of this suit, appellee erected a stone building upon his lot. Appellant having refused to pay one half of the expense of a common or party wall, the east wall was built entirely upon appellee's own land, and extended to his east boundary line, which was the west boundary of appellant's lot. At the time of the erection of appellee's house, that portion of appellant's lot which adjoined it was vacant, but subsequent thereto, appellant erected a wooden shed upon his lot by inclosing three sides,—the appellee's wall acting as an inclosure for the fourth.

The appellee brought this action against appellant to recover damages for an injury to his wall, alleged to have been

caused by appellant in attaching his wooden structure thereto, and also to recover compensation for the use of the wall.

The plaintiff's testimony tended to show that the defendant's structure was annexed to the wall, and that it had been seriously damaged by an employee of defendant, who, in order to construct a gutter for the roof of the shed, had drilled holes in the wall, and had thereby loosened the stone and mortar. The testimony for the defendant tended to show that his wooden structure was upon his own land, and did not touch plaintiff's wall. He admitted that his tinner had made holes in the wall, but testified that when plaintiff objected he ordered the workman to desist, and that the wall was not used to support the gutter. The testimony of defendant's witnesses tended to show that the drilling of the holes in the wall did not seriously damage it.

Upon the trial the defendant asked that the following instructions be given to the jury:—

"1. If you believe from the evidence that the defendant did not join any of his buildings to plaintiff's wall, and is not using plaintiff's wall except as it may be adjacent to his own lot, he would not be liable for rent of such building. Defendant can only be made liable for rent of such of plaintiff's property as he may have taken into his possession.

"2. The mere fact that plaintiff's wall may be beneficial to defendant does not entitle plaintiff to rent or damages for its use. Before finding damages for its use, you must believe that defendant has joined his building to said wall, or has built up to said wall, or has said wall in actual use."

Both of these special charges were refused. The refusal of each is separately assigned as error. Appellee claims there was no error in refusing these instructions, because the law had been properly presented to the jury in the general charge. The court instructed the jury that if defendant used the plaintiff's wall, the plaintiff would be entitled to recover for such use, but failed to instruct them what would constitute such use as would make the defendant legally liable. If the legal propositions involved in the charges refused are sound, then the charge given by the court was deficient. The question then is, whether the owner of a town or city lot is liable to the owner of an adjacent wall when he merely avails himself of it as a part of the inclosure of his premises. We think not.

We have found no authority in support of the affirmative of the proposition. If any liability for the use and occupation of

the wall would exist in such a case, a similar liability would exist whenever one farmer availed himself of his neighbor's fence to complete the inclosure of his own land. Yet we find no authority that recognizes any liability in that case. We take the law to be, that if one proprietor incloses his land, putting his fence upon his line, the owner of the adjacent land may avail himself of the advantage thereby afforded him in inclosing his own land without incurring any liability to account for the use of his neighbor's fence. For any injury to it he would, of course, be liable. So in this case, if the appellant completed his structure without touching or otherwise encroaching upon the appellee's wall, the mere fact that the wall passively served as an inclosure to his structure on its west side would not render him liable to account for the use of it.

If the charges had been given and the jury had rendered the same verdict there would have been evidence enough to sustain it. But we cannot know whether the jury have given a verdict for the use of the wall or for damages to it. If they gave a verdict for the use of the wall, and if the appellant's shed is not in any manner attached to or supported by the wall, as he testified, the verdict is contrary to the law.

For the error of the court in refusing the charges requested, the judgment is reversed and the cause remanded.

PARTY-WALLS. — For the law relating to party-walls, and the rights of the adjacent owners with respect thereto, see monographic note to *Block v. Iskm*, 92 Am. Dec. 289 et seq.

WILKERSON v. SCHOONMAKER.

[77 TEXAS, 615.]

JUDGMENTS, CONCLUSIVENESS OF. — A domestic judgment of a court of general jurisdiction, upon a subject-matter within the ordinary scope of its power, is entitled to such absolute verity that, in a collateral action, even where the record is silent as to notice, the presumption that the court had jurisdiction of the person is so conclusive that evidence *alibi* will not be admitted to contradict it.

JUDGMENTS — COLLATERAL ATTACK. — In collateral proceedings, as between parties and privies, the only contingency in which the judgment of a court of general jurisdiction can be questioned is where the record shows affirmatively that jurisdiction did not attach in the particular case.

JUDGMENTS — COLLATERAL ATTACK. — Where the judgment entry of a court of general jurisdiction is silent as to jurisdiction, the entire record may be looked to, and if it affirmatively appears therefrom that

jurisdiction did not exist, the judgment is void in collateral as well as direct proceedings, and between all persons.

JUSTICE'S JUDGMENT — COLLATERAL ATTACK. — In a collateral proceeding, and in the absence of recitals, every presumption in favor of justice's judgments will be indulged, and they will not be deemed void merely because every fact necessary to give the court jurisdiction does not affirmatively appear in the record. When the record is silent, jurisdiction will not be conclusively presumed, and evidence tending to show that defendant was not served with notice will be admitted.

DEED MADE TO MARRIED WOMAN in her maiden name is valid if clearly shown to have been intended for her.

W. M. McGregor and E. H. Lott, for the appellant.

Hefley and Wallace, for the appellees.

HENRY, A. J. Appellant commenced this suit in the form of an action of trespass to try title to recover 205 acres of land.

The evidence shows that the land was conveyed to Mary A. Rudicil, the wife of W. A. Rudicil. She, for the purpose of enabling her son, J. A. Rudicil, to sell it, and for no other consideration, made him a deed for the land. Subsequently she married J. Schoonmaker. On September 4, 1883, J. A. Rudicil reconveyed the land to Mary A. Rudicil in that name instead of her then name, Schoonmaker. This deed was held by the grantee, but not filed for record until the hour of 12:30, A. M., on the fifth day of February, 1884. Appellant, holding a note for fifty dollars executed by J. A. Rudicil and Mary A. Rudicil to McGregor and Lott, and indorsed by them, brought suit upon it against all of said parties in a justice's court. On the twenty-sixth day of November, 1883, judgment by default for the amount of the note was rendered against J. A. Rudicil and Mary A. Schoonmaker and her husband, John Schoonmaker. Upon this judgment an execution was issued, and the land in controversy was levied upon as the property of J. A. Rudicil, and his interest in it was sold under the levy on the fifth day of February, 1884, to the appellant, C. P. Wilkerson, and a deed for it was made to him by the officer who made the sale.

This cause was tried without a jury, and judgment was rendered in favor of the defendants.

Appellant assigns errors as follows: "1. The court erred in allowing the judgment of the justice of the peace to be attacked by a collateral proceeding; 2. The court erred in permitting the introduction of a deed purporting to have

been executed by J. A. Rudicil to M. A. Rudicil as evidence in the cause, because there was no precedent for its introduction, and because said deed was not executed, nor did it invest title in the land in M. A. Schoonmaker, a party to this cause, but conveyed a certain tract of land to M. A. Rudicil, who was then, so far as the pleading went, a stranger to this cause, it not being alleged in any of plaintiffs' pleadings, nor shown properly in evidence, that Mary Schoonmaker and Mary Rudicil were one and the same person; and because the evidence showed a fraud in the execution of this deed to his mother by J. A. Rudicil long after and within his knowledge of her said change of name by marriage to John Schoonmaker; and because there was no execution of a deed valid and for a valuable consideration by J. A. Rudicil to his mother, M. A. Schoonmaker; and because the circumstances show that the said deed was made to defeat said execution and judgment in favor of said Wilkerson and in fraud of his rights."

The judgment of the justice of the peace contains no recital with regard to the service of citation upon J. A. Rudicil. Upon the question of notice to him of the pendency of the suit it is silent, neither showing that he did or that he did not have such notice.

The return on the original citation was introduced in evidence, and shows that he was not served with that. He testified that he was never notified of the pendency of the suit.

R. Lyles, an attorney, testified that he was present at the justice's court when the judgment was rendered, and that J. A. Rudicil did not appear by attorney or otherwise. He further testified that he examined the papers, and found a citation to J. A. Rudicil, Mary A. Rudicil, W. M. McGregor, and E. H. Lott; that this citation was returned executed as to Mary A. Rudicil, and as to J. A. Rudicil "not found"; that he informed McGregor there was no service on J. A. Rudicil, and that McGregor then draughted a judgment which the justice of the peace entered up in the case; that he examined the papers at the request of McGregor, to ascertain if judgment by default could be properly taken against J. A. Rudicil and Mary A. Rudicil.

McGregor testified as follows: "I think I examined the papers in the case. My recollection is, that there was service perfected on J. A. Rudicil. There was one citation from San Antonio to J. A. Rudicil returned 'not found.' There was one

to San Antonio returned served. It is only my impression now, and simply as an opinion, that there was service."

The justice of the peace who rendered the judgment testified that his memory was, that a citation issued to San Antonio for J. A. Rudicil was served; "remember sending citation out there, and that is all,—don't remember its having been returned."

By repeated decisions it has been announced by this court "that a domestic judgment of a court of general jurisdiction upon a subject-matter within the ordinary scope of its power and proceedings is entitled to such absolute verity that in a collateral action, even where the record is silent as to notice, the presumption, when not contradicted by the record itself, that the court had jurisdiction of the person also is so conclusive that evidence *aliunde* will not be admitted to contradict it": *Fitch v. Boyer*, 51 Tex. 344; *Tennell v. Breedlove*, 54 Tex. 540; *Lawler v. White*, 27 Tex. 250.

In *Murchison v. White*, 54 Tex. 82, it is said: "In collateral proceedings, the only contingency in which the judgment of a domestic court of general jurisdiction can be questioned is where the record shows affirmatively that its jurisdiction did not attach in the particular case." This rule is applied to the parties to the proceeding and their privies, but not to strangers.

In cases where the judgment entry is silent upon the question of jurisdiction, the entire record may be looked to, and if it affirmatively appears therefrom that it did not exist, the judgment must be held void in collateral as well as in other proceedings, and between all persons: *Hearn v. Camp*, 18 Tex. 546; *Mills v. Herndon*, 60 Tex. 359, 360; *Brockenborough v. Melton*, 55 Tex. 503.

In the case of *Hearn v. Camp*, 18 Tex. 546, the jurisdiction was defeated by recitals contained in the petition for letters of administration, and in the inventory afterwards filed.

The question now before us with regard to the judgment of a justice of the peace was considered by this court in the case of *Williams v. Ball*, 52 Tex. 603. In that case, as in this, the judgment entry was silent upon the question of notice to the defendant, and he testified that he was never served.

In the opinion the case of *Bumpus v. Fisher*, 21 Tex. 567, was referred to as holding that "it is the tendency of American decisions to liberalize the rule of construction with reference to the inferior courts"; and that "the rule with respect to courts of limited jurisdiction that everything must appear

on the record strictly and affirmatively which will give them jurisdiction to hear and determine is rapidly giving way by the application to our courts, as they are actually constituted, of the same principles which originally formed the rule with reference to their own courts in England."

With regard to titles depending upon judgments of justices' courts, it is further said in the case of *Williams v. Ball*, 52 Tex. 603, that "to hold these titles void unless the record shows affirmatively all the necessary facts would virtually defeat many of them, involve the country in litigation, and would be contrary to repeated rulings of this court, which hold that such proceedings should be liberally construed. Judgments of justices of the peace when apparently within the ordinary scope of their power and jurisdiction cannot, as was sought to be done in this case, be collaterally attacked as being void for the reason that they do not show affirmatively all the facts necessary to have given the court jurisdiction. If in such cases generally the testimony of the defendant be admissible—which we do not now concede—to prove that in fact he was not served with process, yet in the case under consideration we cannot say that the court erred in not holding it sufficient to overturn the presumption in favor of the regularity of the judgment."

These cases are authority for holding that it is not necessary for everything to affirmatively appear in the record of a justice's judgment which is required to exist to confer upon them jurisdiction with regard to the person or to the subject-matter. But they do not go to the opposite extreme, and hold that the rule applied to other courts of general jurisdiction, that where the record is silent on the subject jurisdiction will be conclusively presumed, and no evidence to the contrary will be heard.

While the opinion in the case of *Williams v. Ball*, 52 Tex. 603, contains expressions capable of being construed as deciding that the courts of justices of the peace should, under our constitution, be treated as courts of general jurisdiction, we do not think it was intended to decide more than that in the absence of recitals every presumption in favor of their validity must be indulged, and that they will not be held void merely because every fact necessary to give the court jurisdiction does not affirmatively appear in the record. Evidence *aliunde* was heard both in *Bumpus v. Fisher*, 21 Tex. 567, and in *Wil-*

liams v. Ball, 52 Tex. 608, and it was not decided to be inadmissible in either case.

Even when justices' courts are recognized to be courts of general jurisdiction, we think that the fact that all proceedings in them are conducted orally justifies some distinction in this respect between them and other courts of general jurisdiction in which the proceedings are required to be in writing, and which writings may be referred to on the question of jurisdiction. We do not think that the presumption in favor of the jurisdiction of a justice of the peace in all cases, even when the record is silent on the subject, should be lightly treated or disregarded, especially when the judgment has long been acquiesced in, and when the circumstances indicate that the party against whom it was rendered either had notice of it, or by the use of reasonable diligence might have acquired such notice.

In the case before us the transaction was a recent one, and we think that evidence tending to show that the defendant was never served with notice was properly admitted.

With regard to the second objection, notwithstanding the deed was made to Mrs. Shoonmaker by her former name of Rudicil, the evidence very clearly explains that it was intended for her, and we do not think that the deed should have been excluded for that or any other objection made to it.

The judgment is affirmed.

JUDGMENTS—COLLATERAL ATTACK.—Only when a judgment shows upon its face want of jurisdiction can it be attacked collaterally; not even will evidence of fraud *aliunde* the record be received to dispute a judgment, although the fraud was in obtaining the jurisdiction: *Williams v. Haynes*, 77 Tex. 283; *ante*, p. 752, and note.

JUDGMENTS, PRESUMPTIONS IN FAVOR OF.—Justices' courts are within their defined limits tribunals of general jurisdiction, and all reasonable presumptions are indulged in support of the validity of their judgments: *Heck v. Martin*, 75 Tex. 469; 16 Am. St. Rep. 915, and note; compare *McGowan v. Lufburrow*, 82 Ga. 523; 14 Am. St. Rep. 178, and note 182, 183. As to recitals in judgments with respect to jurisdictional facts, see *Ex parte Starnes*, 77 Cal. 156; 11 Am. St. Rep. 251, and note 256, 257.

CASES
IN THE
COURT OF APPEALS
OF
TEXAS.

GRAHAM v. STATE.

[28 TEXAS APPEALS, 9.]

CRIMINAL LAW — ADULTERY OF WIFE — DECLARATIONS OF HUSBAND AS EVIDENCE. — On the trial of a woman for adultery, evidence that her husband, since deceased, had declared to witness, in the presence of the alleged guilty parties, that he desired witness to remain with him and give him his medicine; that he would take anything he might give him; that he was afraid to trust either of the alleged guilty parties; and that witness did not know what went on there while he, the husband, was alone with them, as they aggravated him all they could, — is incompetent, because uncertain, as referring to acts of lewdness showing illicit intercourse, or a disposition to have such intercourse on the part of the alleged guilty parties. Where, however, the admission of such evidence works no injury, it is not ground for reversal.

Garnett, Muss, and Mangum, for the appellant.

W. L. Davidson, assistant attorney-general, for the state..

HURT, J. This was a conviction for adultery. The indictment charges that Dave Graham and Sally Graham did live together and have carnal intercourse with each other, the said Sally being a married woman; the second count being "that the said Dave Graham and Sally Graham, both being unmarried, did live together and have carnal intercourse with each other."

It appears that Dave Graham was the first cousin of John Graham, who was the husband of Sally Graham, the appellant. John Graham died some time in March, 1888. Before his death, Dave had been living with him, — John being sick several weeks before he died. On the 4th of July, 1888, six

days before this case was called for trial, Sally and Dave married.

Adultery is charged between these parties, Dave and Sally, on the 1st of February, 1888, before the death of John Graham. Fornication between the parties is alleged on the same day, but the proof is confined to acts of the parties subsequent to John's death.

Upon the trial, over objection, the state proved by Hudson that John Graham, the former husband of Sally, stated to Hudson, in the presence of the defendant and Dave Graham, that he (John) desired him (Hudson) to remain with him and give him his medicine; that he would take anything witness would give him; that he was afraid to trust his wife, Sally Graham, and Dave Graham; that he, witness, did not know what went on there when he was alone with them; that they aggravated him all they could.

The objections are, — 1. That this is hearsay; 2. Irrelevant; 3. That as John could not be a witness against his wife, what he said could not be used in evidence, though said in presence of the accused.

This is not hearsay, but we are of opinion that the testimony is irrelevant, because it is uncertain in its character. If John Graham had reference to the lewd conduct of his wife and Dave, then the facts would be relevant as a circumstance tending strongly to corroborate the other criminative facts. But as a great many things may have been done and said by appellant and Dave calculated to destroy John's confidence in his wife, and which did not involve the virtue of his wife, John may have alluded to these. Hence there is a want of certainty — not cogency or strength — in this testimony. It is not at all certain that John had reference to acts of lewdness showing illicit intercourse or a disposition on their part to have such intercourse.

The assistant attorney-general urges that conceding, for the argument, that this matter was incompetent, it is without injury. Appellant was convicted of adultery, the lowest fine being imposed. In addition to the most convincing circumstances showing guilt, a witness swears positively to the fact, and no honest jury under such proof could do otherwise than convict.

The third objection to this evidence is not well taken. Let it be conceded that if John were living he could not be a witness against the appellant, still if appellant had confessed her

guilt to him in the presence of another, while John could not swear to this, the other person could.

Objection is urged to the charge, because in defining adultery the court embraces habitual intercourse. This, however, is cured when the law is directly applied to the case.

We find no error requiring a reversal, and the judgment is affirmed.

NON-PREJUDICIAL ERRORS IN ADMITTING EVIDENCE. — The improper admission of immaterial evidence which has worked no prejudice to the party complaining is no reason for disturbing a verdict: *Moon v. Rollins*, 36 Cal. 233; 95 Am. Dec. 181; *Ment v. Home Ins. Co.*, 76 Cal. 51; 9 Am. St. Rep. 158.

CROWDER v. STATE.

[28 TEXAS APPEALS, 51.]

CRIMINAL LAW — CONFESSIONS AS EVIDENCE. — Article 750 of the Code of Criminal Procedure of Texas provides, in relation to confessions, that "a confession shall not be used if, at the time it was made, the defendant was in jail, or other place of confinement, or in custody of an officer, unless such confession is made in the voluntary statement of the accused, taken before an examining court in accordance with law, or made voluntarily after being first cautioned that it may be used against him, or unless in connection with such confession he makes a statement of facts or of circumstances that are found to be true, which conduce to establish his guilt, such as the finding of secreted or stolen property." Under this provision, the facts stated by the accused must first be found to be true in pursuance of or by means of the information received from him; and if they are first found to be true from any other source of information, the confession is not admissible. If, however, they are first found to be true in pursuance of his statement, and afterwards found to be true from information derived from another source, the confession is admissible.

J. S. Bounds, and McKinnon and Carlton, for the appellant.

W. L. Davidson, assistant attorney-general, for the state.

HURT, J. This conviction is for burglary. Upon the trial, over the objection of the defendant, the state introduced in evidence his confession.

The facts were these: The storehouse of Odell and Melton was burglarized on the night of December 7, 1888. James, the town marshal of Hubbard City, arrested the defendant on the next day about nine o'clock, placed him in the calaboose, and kept him there all day. During the day the marshal talked to the defendant about the burglary. Defendant

denied all knowledge of the same. About eleven o'clock on Sunday night, December 8th, James and Graves went to the calaboose and had a conversation with defendant about the burglary. James told defendant that he knew that Jeff Stewart, another negro, was connected with him in the burglary, and that if he would give Stewart away, he, defendant, would be released. James also told him that they had found some money in Cromer's loft. Thereupon defendant told James that he had concealed the money at a certain place in the loft of Cromer's hotel. James and Graves then left defendant in the calaboose, and went to the hotel to make search for the money. They searched the place named by the defendant, but failed to find the money, because they misunderstood the directions given by the defendant. James then went back to the calaboose, whence he brought the defendant to the hotel loft. When in the loft James told defendant that he could not find the money, and requested defendant to point out the place where he had concealed it. Defendant pointed out a place. But it seems that while James was gone to the calaboose, Cromer, the hotel-keeper for whom Jeff Crowder and Jeff Stewart were hotel servants, received information of the place where the money was concealed from Jeff Stewart. Cromer says: "On Sunday night, after the burglary, when James and I were looking in the loft of my hotel for the money, . . . the negro (meaning Stewart) who was working for me showed me where he said the defendant had hid the money. This was while James was gone to the calaboose after defendant. I got the money, and when James came with defendant, he, defendant, went to the place where I found the money. I showed it to him, and he said it was the money he had got out of Odell and Melton's saloon."

It appears that but one person entered the house, and that this person wore a pair of overshoes. A pair of overshoes were found in the hotel sample-room. Defendant and the other negro slept in this room. Appellant was not cautioned as the law directs.

We have this question for solution: A makes a statement of facts or circumstances found to be true, which conduce to establish his guilt (Code Crim. Proc., art. 750); but the fact is found to be true, not through or by means of the information received from A, but from that received from another source, or by accident. A being under arrest and without caution, is his confession, made under this state of case, admissible in

evidence against him? Strong reasons can be given in favor of the admissibility of the confession.

Let us take a case of murder. B is hunting in a forest in which several caves are situated near together. He enters a cave, and finds the body of a man who has evidently been murdered by some one. The murder was committed with a sharp-edged instrument. His curiosity being aroused, he continues to search, and in another cave, near to that containing the body, he finds a bloody dirk concealed in a crevice; and continuing his investigation, he finds, under a rock, a purse containing twenty gold pieces, of the denomination of twenty dollars. He goes to his neighbor, tells him nothing of his discoveries, but induces him to accompany him to the caves, and shows to him all he had discovered. Neither discloses to any other person what they had seen. They keep their secret, believing this to be the best course to pursue in order to detect and arrest the murderer. Circumstances point to C as the guilty party. He is arrested, and confesses his guilt, stating that, at a certain time, he and the deceased met in that forest; that he killed him with a dirk; that he killed him for his money; that he took from his person a purse containing twenty twenty-dollar gold pieces, and concealed them in a cave near the cave in which he hid the body. At the trial, B and his neighbor swear that they never disclosed to any one, either by word or otherwise, what they had seen in the caves. Under the above state of case, are the confessions of C competent, — admissible in evidence against him?

C, the defendant in this supposed case, made a statement of facts and circumstances which were found to be true, and which conduced to establish his guilt; but they were not found to be true by means of the information obtained from C; they had already been discovered. In the case put, it is evident that C's knowledge of the facts was obtained through his guilty participation in the murder, and not from B or his neighbor, or others through them, or either of them. But the illustration presents a rare case indeed, — such as would not arise in a thousand cases. Honest and truthful men, through prudential considerations, conceal such discoveries; they must disclose such matters, and that promptly, at least to some of their neighbors.

On the other hand, cogent reasons will be found in support of the rule that the facts and circumstances must be discovered in pursuance of the information received from the

defendant. A crime is committed; the news spreads, and is on the tongues of men, women, and children. The accused is arrested, and being thus placed in a fearful condition, he becomes alarmed. Officers and friends, believing him guilty, suggest a confession. Believing that it would be better for him, or that his life would be saved by so doing, he confesses; and having heard in some way the true facts, or some of them, — though by what means or from what source is a mystery to others, — he relates them, or one of them. This is found to be true; and conducing to establish his guilt, his confession is received in evidence, and conviction usually follows.

The case in hand illustrates this very strongly. From the evidence, it is rendered certain that but one person entered the house. Was it the defendant, or was it Jeff Stewart? Did Stewart learn of the whereabouts of the money from defendant? or did the defendant learn of the place where the money was hid from Jeff Stewart? Did the defendant steal the money, and inform Stewart of that fact, and also inform him of its place of concealment? Or did Stewart steal the money, and give such information to the defendant?

We believe that the statute (Code Crim. Proc., art. 750) requires that the facts and circumstances stated by the accused must be found to be true in pursuance of or by means of the information received from the accused, and that if they are found to be true from any other source than that emanating from defendant, his confession will not be admissible. But we wish to be careful at this point.

Suppose the accused should make a statement of a fact, which fact, in pursuance of his statement, is found to be true, and that after it is found to be true in pursuance of his statement, others should find the same fact to be true from information received from another source. This would not render the confession incompetent.

In support of the conclusion reached, we cite the following authorities, viz.: Code Crim. Proc., art. 750; *Walker v. State*, 2 Tex. App. 326; *Allison v. State*, 14 Tex. App. 122; *Nolen v. State*, 14 Tex. App. 474; 46 Am. Rep. 247.

The judgment is reversed, and the case is remanded for another trial.

CRIMINAL LAW — CONFESSIONS OF DEFENDANT. — Confessions as evidence, and when admissible as voluntary: *Ellis v. State*, 65 Miss. 44; 7 Am. St. Rep. 634, and note; *Heldt v. State*, 20 Neb. 492; 57 Am. Rep. 835, and particularly note 839-842; extended note to *Daniels v. State*, 6 Am. St. Rep. 242-

251. A confession made by a prisoner, without question or suggestion made to him, is voluntary, and admissible against him: *People v. Gastro*, 75 Mich. 127; *Young v. State*, 50 Ark. 501; *Anderson v. State*, 25 Neb. 550; even though the inducement is held out to him that by pleading guilty he will get a shorter term: *People v. Eckman*, 72 Cal. 582. In *State v. Moran*, 15 Or. 262, where defendant agreed to and did testify freely at the trial of another accused of the same killing with which he himself was charged, but afterwards escaped, it was decided that upon his recapture and trial his former testimony was admissible against him as a confession. Confessions of an accused, made against himself, are not inadmissible against him merely because the witness testifying thereto did not hear and could not give the whole of the conversation during which the confessions were made, provided the admissions actually heard were complete in themselves: *Commonwealth v. Taylor*, 129 Pa. St. 535. Statements of a prisoner, made subsequently to the alleged crime, when in excuse or explanation of his acts, are always inadmissible, unless they constitute a part of the *res gesta*: *State v. Ward*, 103 N. C. 419; compare *Searcy v. State*, 28 Tex. App. 513, *post*, p. 551.

HUNT v. STATE.

[28 TEXAS APPEALS, 149.]

CRIMINAL LAW—ALLUSION TO DEFENDANT'S FAILURE TO TESTIFY AS GROUND FOR NEW TRIAL.—A statute providing that "any defendant in a criminal action shall be permitted to testify in his own behalf therein, but the failure of any defendant to so testify shall not be taken as a circumstance against him, nor shall the same be alluded to or commented on by counsel in the cause," absolutely prohibits, under any circumstances, any allusion to, as well as any comment to the jury on, defendant's failure to testify in his own behalf. Such comment by counsel is ground for a new trial.

INDICTMENT and conviction of cattle theft.

Davis and Woodruff, for the appellant.

W. L. Davidson, assistant attorney-general, for the state.

WHITE, P. J. By the first section of the act of the legislature approved April 4, 1889, with regard to the evidence in criminal actions, and repealing the fourth subdivision of article 730 of the Code of Criminal Procedure, it is provided "that hereafter any defendant in a criminal action shall be permitted to testify in his own behalf therein, but the failure of any defendant to so testify shall not be taken as a circumstance against him, nor shall the same be alluded to or commented on by counsel in the cause": Gen. Laws 21st Leg., p. 37.

Defendant's third bill of exceptions shows that in his closing argument the district attorney proceeded to comment on the failure of the defendant to testify in this case, and proposed

and attempted to read to the jury the law, as we have above quoted it, empowering him to do so; and that though he was stopped and admonished from the bench that he had no right to read and comment upon said law, said attorney claimed he had such right. This bill of exceptions is qualified by the trial judge with the explanation that "the attorney for the defendant, alluding to what the witness Stevens had stated in reference to defendant's admissions, (said?) that 'You have not yet heard the defendant's statements.' The district attorney stated in his closing argument: 'It was the same old story,—defendant's mouth was closed'; and picked up the acts of the last legislature and commenced to read the act allowing a defendant to testify, when the court called him to order of his (its?) own motion, and (he?) was told by the court that he could not read that law in the hearing of the jury; when in answer to the admonition of the court (said prosecuting attorney?) wanted to know 'if the court would allow defendant's counsel to sing that same old song, and not allow the state to reply?' The court told him that he could neither read or comment on the law referred to."

The language of our statute prohibits any allusion to, as well as comment on, a defendant's failure to testify in his own behalf. No argument made by the defendant's counsel could or would justify the prosecuting attorney in alluding to or commenting upon the facts in violation of the plain letter of the law.

Upon a statute substantially in effect with ours, the supreme court of Indiana held that "an allusion by counsel for the state, in a criminal prosecution, made during his argument of the cause before the jury, to the fact that the defendant had failed to testify as a witness on the trial of such cause, is sufficient ground for a new trial; and it is not cured by the fact that the court admonished the counsel that such allusion was improper, and instructed the jury that no attention should be paid by them to the same." In the opinion it is said: "We construe the statute to mean that when a defendant in a criminal cause declines to testify in his own behalf, absolute silence on the subject is enjoined on counsel in their argument on the trial": *Long v. State*, 56 Ind. 179; 26 Am. Rep. 19.

In *Commonwealth v. Scott*, 123 Mass. 239, 25 Am. Rep. 87, the supreme court of Massachusetts say: "The absolute exemption secured to defendants by the constitution and laws from being compelled to testify and from having their omis-

sion to do so used in any way to their detriment, could not be affected by superfluous or irregular suggestions of their counsel in the heat of argument. That exemption could only be waived by each defendant's own election to avail himself of the statute, and to go upon the stand as a witness"; citing *Commonwealth v. Nichols*, 114 Mass. 285; 19 Am. Rep. 346.

In a case involving the same question, the supreme court of Illinois say: "The statute in unmistakable terms has declared, in effect, that the omission of the accused to testify shall not be used to his prejudice or taken as an evidence of guilt; and in such case court and counsel should studiously avoid all allusions to the subject": *Baker v. People*, 105 Ill. 452; see also Wharton's Crim. Ev., 9th ed., sec. 435 a.

We do not propose to discuss any other of the several questions raised on this appeal. Some of them cannot, and others may or may not, arise or be presented in the same form.

Because the prosecuting officer violated the statute with reference to the defendant's failure to testify, the judgment is reversed, and the cause remanded for another trial.

CRIMINAL LAW—DEFENDANT'S FAILURE TO TESTIFY.—The omission of a defendant to testify in his own behalf must not be commented upon by the prosecuting attorney: Note to *McDonald v. People*, 9 Am. St. Rep. 567. Where defendant does not testify as a witness in his own behalf, the failure of the court to instruct the jury not to consider his failure to testify as presumptive evidence of his guilt is not error, where defendant did not request such an instruction: *People v. Flynn*, 73 Cal. 511. But the prosecuting attorney may comment, in his argument to the jury, upon the fact that the father of the accused, being present, was not called as a witness for the defense: *Grimes v. State*, 28 Tex. App. 516, post p. 853.

CLARK v. STATE.

[28 TEXAS APPEALS, 129.]

CRIMINAL LAW—ROBBERY—EVIDENCE.—On a trial for robbery, evidence is admissible to show that subsequently to the commission of the crime, the fruits thereof were found in the possession of one of defendant's co-conspirators, whose complicity in the commission of the robbery has been fully established.

CRIMINAL LAW—ROBBERY—EVIDENCE.—On a trial for robbery, evidence is admissible that defendant and his co-conspirator, while in custody and at the time of their preliminary examination, informed the witness of the place of concealment of some of the fruits of the crime, and requested and tried to induce him to remove them.

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WITNESS — OPINION AS EVIDENCE. — On a trial for robbery, a witness may state as his opinion that tracks made at the place of the robbery correspond with those made by the boots or shoes worn by defendant.

DEPOSITION AS EVIDENCE. — The deposition of a deceased witness, certified by the officer taking it as being correct, and afterwards identified by him, is admissible in evidence, and no objection can be raised to the form of the officer's certificate when no particular form is prescribed by statute.

INSTRUCTION DEFINING ROBBERY in the exact language of the statute is sufficient and unobjectionable.

CRIMINAL LAW. — INDICTMENT FOR ROBBERY may charge defendant in the same count with felonious acts with respect to several parties, as the taking of certain personal property from one, and money from another, if it was all one transaction; and if the proof follows the allegations, it will authorize a conviction.

JURY, DISCRETION OF JUDGE IN DISCHARGING. — It is within the discretion of the court as to whether or not it will discharge the jury because it has been kept together such a time as to render it improbable that it will agree, and such discretion will not be reviewed unless it has been abused.

JURY, READING DEPOSITION TO, AFTER RETIREMENT. — After the jury has retired, and has disagreed about a deposition which was introduced in evidence during the trial, it is not error to allow it to be reread to the jury at its request.

CRIMINAL LAW — CONSPIRACY EVIDENCE. — When two or more persons combine or associate together for the prosecution of some fraudulent or illegal purpose, the acts and declarations of any of them, made in furtherance of the common purpose, and forming part of the *res gestæ*, are admissible in evidence against the others; otherwise, however, as to subsequent acts, admissions, or declarations.

CRIMINAL LAW — CONSPIRACY EVIDENCE. — As between conspirators, antecedent acts and declarations of each, pending and in pursuance of the common design, and tending to throw light upon its execution, or upon the motive or intent of the perpetrators, are competent evidence against each and all of them; and when the conspiracy is proved, the declarations and movements of other conspirators before the perpetration of the crime are admissible against the defendant, though occurring in his absence.

CONVICTION of robbery under an indictment, the charging part of which reads as follows: "W. A. Clark . . . did then and there, upon the persons of C. W. Churchwell and J. A. Taylor, unlawfully, willfully, and feloniously make an assault, and them, the said C. W. Churchwell and J. A. Taylor, by means of said assault, and by violence, in fear of their lives and bodily injury, then and there feloniously did put; and one pistol, of the value of ten dollars, the same being the corporeal personal property of said C. W. Churchwell, and four silver coin dollars, current money of the United States of America, of the value of four dollars; one twenty-dollar bill, current money of the United States of America, of the value of twenty dollars,

and a better description of which the grand jurors are unable to give,—all of said money being the corporeal personal property of the said J. A. Taylor,—from the possession, and against the will of them, the said C. W. Churchwell and J. A. Taylor, then and there violently and fraudulently did take and carry away, with the intent then and there of appropriating the said property of the said C. W. Churchwell and J. A. Taylor, to the use and benefit of him, the said W. A. Clark; against the peace and dignity of the state.” The other facts are stated in the opinion.

W. L. Davidson, assistant attorney-general, for the state.

WHITE, P. J. 1. Appellant's motion in arrest of judgment, based on the supposed insufficiency of the indictment, was properly overruled. It sufficiently charged the crime of robbery under our statute and decisions: Pen. Code, art. 722; Willson's Crim. Stats., sec. 1248.

2. Appellant was alone indicted in this prosecution for the robbery, but the evidence disclosed most fully, as we think, that his brother, one A. A. Clark, was a joint and principal offender with him, acting with him prior to, at the time of, and subsequent to the commission of the crime. Both parties were arrested, and tried before an examining court for the crime. Appellant's first bill of exceptions, reserved at his final trial in the district court from which this appeal was taken, shows that the prosecution proposed to prove by one Prewitt that about ten days after the robbery he, Prewitt, arrested the defendant's brother, the said A. A. Clark, and found upon and took from the person of the latter a pistol, which Churchwell, one of the parties robbed, identified on the examining trial as the pistol taken from him by the robbers. A pistol was by the indictment alleged to have been taken from the injured parties, together with other property, at the time of the robbery. Defendant's objection to this testimony was, that at the time the pistol was found upon A. A. Clark, the conspiracy, if any, and the crime had been consummated. Whilst it is a well-established rule that the acts, conduct, and declarations of one co-conspirator subsequent to the consummation of the conspiracy are inadmissible as evidence against another conspirator, such rule has never been extended so as to exclude evidence of the subsequent finding of the fruits of the crime in the possession of one of the co-conspirators, whose complicity in the perpetration of the crime

has been fully established. It is a circumstance of the most potent character in the identification of the parties, and "any fact or circumstance which would tend to prove the guilt of the co-defendant would also tend to prove the guilt of the defendant, and would be admissible against him." *Pierson v. State*, 18 Tex. App. 524, is directly in point upon the question as here presented. See also *Jackson v. State*, 23 Tex. App. 143. This testimony was legal and admissible, but defendant's bill of exceptions shows that his objection to the evidence was sustained by the court, and the witness was not permitted to testify to the fact. Under such circumstances, we are at a loss to know why defendant's counsel have preserved the bill, and of what they can complain with reference to the matter.

3. The same may be said of defendant's second bill of exceptions. On objection of defendant to the proposed testimony of Satterwhite as to matters told him by the witness Charley Clark,—because hearsay,—the objection was promptly sustained, and Satterwhite was not permitted to testify. As to the witness Charley Clark, he denied most positively that his brothers, at their examining trial, had told him of the whereabouts of the pistol, and denied that he had gone to the place of its concealment, found it, and carried it away. If the prosecution had reason to believe that the defendants had so informed Charley Clark, and had induced him to go and get the pistol and take it away, the state's counsel had the undoubted right to question him upon the subject. If the weapon, being fruits of the crime, had been found by the witness at the place and upon the information derived from the defendants, the evidence was admissible, though defendants were in arrest at the time they gave him the information. The prosecution had the right, and it was proper, to question the witness upon the matter, and even if the court, upon the objections of defendant's counsel, had erroneously refused to allow the questions to be asked, the refusal would not be subject to criticism in this court. *McDonel v. State*, 90 Ind. 321.

4. The state's witness Williams was permitted to testify, over objections of defendant, that two days after the robbery, he went to the scene of the crime with Taylor, one of the parties robbed, and others, and there examined the footprints or tracks around and about the spot, which tracks he described; that afterwards he, the witness, was present at

tending the examining trial of defendants, and noticed the boots of defendant and the shoes of his brother, A. A. Clark, then also on trial, and that, in his opinion, the tracks made at the place of the robbery corresponded with and were made by the boots and shoes of defendant and said A. A. Clark. This testimony was objected to as inadmissible, because it was merely the opinion of the witness, and that opinion is not admissible as evidence.

In his standard work on criminal evidence, that eminent law-writer Mr. Wharton says the true line of distinction is this: "An inference necessarily involving certain facts may be stated without the facts, the inference being an equivalent to a specification of the facts; but when the facts are not necessarily involved in the inference (e. g., when the inference may be sustained upon any one of several distinct phases of fact, none of which it necessarily involves), then the facts must be stated. In other words, when the opinion is the mere shorthand rendering of the facts, then the opinion can be given subject to cross-examination as to the facts upon which it is based. Opinion, as far as it consists of a statement of an effect produced on the mind, becomes primary evidence, and hence admissible whenever a condition of things is such that it cannot be reproduced and made palpable to the jury": Wharton's *Crim. Ev.*, 9th ed., secs. 458, 459. See also *Powers v. State*, 23 Tex. App. 43. In *State v. Reitz*, 88 N. C. 633, it was held that opinion as to correspondence of footprints with shoes is admissible.

The almost identical question here raised came before this court in the case of *Thompson v. State*, 19 Tex. App. 594. "A state's witness, having described the peculiarity of a certain track seen by him at the place of the homicide, was permitted, over objection, to testify that thereafter, at the examining trial, he saw on the foot of one of the defendant's alleged accomplices a boot which would have made such a track as the one he saw at said place," and the evidence was held admissible.

5. In our opinion, there is no merit in defendant's third and fourth bills of exceptions relative to the reproduction of the testimony of C. W. Churchwell, which had been reduced to writing upon the examining trial, the witness having subsequently died. The justice of the peace was properly permitted to state the circumstances attendant upon the taking of the deceased witness's testimony, and to identify the same.

As to the objection that the justice's certificate attached to said written testimony is insufficient, it seems that no particular form for such certificate is prescribed by law, and in our opinion, the certificate of the justice in this instance, as shown in the record before us, is sufficient: *Golden v. State*, 22 Tex. App. 1; *Kirby v. State*, 23 Tex. App. 13; *O'Connell v. State*, 10 Tex. App. 567; *Kerry v. State*, 17 Tex. App. 178; 50 Am. Rep. 122; Willson's Crim. Stats., sec. 2535; Code Crim. Proc., arts. 267, 774. The testimony of the deceased witness, Churchwell, as taken and reduced to writing, was properly admitted as legal evidence in the case.

6. Defendant's sixth bill of exceptions relates to supposed defects and omissions in the charge of the court to the jury. None of these objections are maintainable. Robbery was defined literally in the language used in the code (Pen. Code, art. 722); and as for the punishment, the learned trial judge might well, in view of the facts proved on the trial, have added to the definition the latter clause of said article 722, and thereby emphasized the crime denounced, where two or more persons are acting together using and exhibiting fire-arms and deadly weapons in the accomplishment of their purpose. Correct rules with regard to circumstantial evidence were clearly announced.

But it is insisted that "the court failed to charge the jury that if the proof showed that the pistol was taken from the person and possession of Churchwell alone, and that the money was taken from the person and possession of Taylor alone, and that Taylor had no interest or property in the pistol, and Churchwell had no interest or property in the money (and this was the uncontroverted proof in the case), then the jury should acquit the defendant, because such proof would not sustain the allegation in the indictment, that said property was taken from both Churchwell and Taylor." The allegation in the indictment was, that the pistol was the property of and was taken from the person and possession of Churchwell, and the money was alleged to be the property of and to have been taken from the possession of Taylor. These allegations as to ownership and possession were specifically proved as alleged, and the charge of the court conformed the law to the allegations and proof. In robbery "the indictment may charge the defendant in the same count with felonious acts with respect to several parties, as with having assaulted A and B, and stolen from A one shilling, and from

B two shillings, if it was all one transaction": 1 Bishop's Crim. Proc., 3d ed., sec. 437; 2 Bishop's Crim. Proc., sec. 60.

7. After the jury had been out a day and night considering of their verdict, they sent word to the court by the officer in charge of them that they could not agree. The presiding judge had them brought into the court-room, and stated to them that he did not intend to discharge them, and that he did not think they had sufficiently considered of the case. The statute makes it a matter of discretion with the court as to whether it will discharge a jury because they have been kept together such a time as to render it altogether improbable that they can agree: Code Crim. Proc., art. 701; Willson's Crim. Stats., sec. 2390. Such discretion is not revisable in this court unless it has been abused.

8. Defendant's eighth bill of exceptions complains that the court permitted the testimony of the deceased witness, Churchwell, taken at the examining trial, to be reread for the third time to the jury after they had been in retirement considering of their verdict two days and nights. Explaining this bill, the learned judge says: "The reading of Churchwell's testimony was upon the request of the jury to the court, their statement being that they differed as to what Churchwell had testified. The court thereupon caused the reading, as above stated, it having once before upon a similar request been read after the charging of the jury." We have no statute expressly providing for the reading of the written testimony or deposition of a witness where the jury have disagreed as to such testimony. When the witness has testified orally, he can be recalled to the stand and directed to detail his testimony again to the jury as to the particular point of disagreement, and no other: Code Crim. Proc., art. 697. Where the evidence is by deposition or in writing, taken on examining trial, we can see no good reason why, if the jury so desire, they cannot have it reread to them, where they have disagreed about it. Such written testimony cannot be easily altered.

At all events it is to be presumed that it has not been altered until the contrary is shown, and where this is not done, we cannot perceive how its being reread in the same identical language could mislead the jury, or unjustly prejudice the defendant. We are unable to see that any error has been committed or wrong done the defendant in this regard, as the same appears in the bill of exceptions.

9. Defendant's eleventh bill of exceptions complains that

the court permitted one Utterbeek to testify, over defendant's objections, that three or four hours before the robbery, whilst he, witness, was paying to the prosecuting witness Taylor, at a desk in witness's store, \$125, A. A. Clark, defendant's brother, and the one who was implicated with him in the robbery, was present in the store, within seven or eight feet of Taylor, and could have seen the money paid. Objection to this testimony was, that at the time of the money transaction between Utterbeek and Taylor, the defendant was not present, and there was no conspiracy or common design at that time between defendant and A. A. Clark to commit the robbery, and that no circumstance connected with or act or conduct of A. A. Clark before the conspiracy was entered into between him and defendant was, or should be, admitted as competent evidence against defendant.

"When two or more persons combine or associate together for the prosecution of some fraudulent or illegal purpose, the acts and declarations of any one of them, made in furtherance of the common purpose, and forming a part of the *res gestæ*, are admissible as evidence against the others; otherwise, however, as to subsequent acts, admissions, or declarations. . . . In regard to the admission of the acts and declarations of one conspirator as original evidence against each member of the conspiracy, substantially the same rule applies in criminal as in civil cases. The principle on which the acts and declarations of other conspirators, and acts done at different times, are admitted in evidence against the person prosecuted is, that by the act of conspiring together the conspirators have jointly assumed to themselves, as a body, the attribute of individuality, so far as regards the prosecution of the common design, thus rendering whatever is said or done by any one in furtherance of that design, a part of the *res gestæ*, and therefore the acts of all": 4 Am. & Eng. Ency. of Law, 631, 632. As between conspirators, antecedent acts and declarations of each, pending and in pursuance of the common design, and tending to throw light upon its execution, or upon the motive or intent of its perpetrators, are competent evidence against each and all of them: *Cox v. State*, 8 Tex. App. 256; 34 Am. Rep. 746. And where a conspiracy has been proved, as we think was most clearly done in this case, sayings and movements of other conspirators before the perpetration of the crime are admissible against the defendant, though occurring in his absence: *Williams v. State*, 24 Tex. App. 17; *Spies v. People*, 122 Ill. 1; 3 Am. St. Rep. 320; *McKee v. State*, 111 Ind. 378.

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In this case, the fact that A. A. Clark saw Taylor receive the money is a strong circumstance tending to show that if he was not there to ascertain that very fact, in furtherance of a conspiracy already formed to rob him, that the defendant did know of the receipt of the money by Taylor, and that that knowledge induced him to enter into the plan already determined upon by his brother, A. A. Clark, to rob Taylor. But as intimated above, the evidence tended to show that a conspiracy already existed between the brothers to rob Taylor, and A. A. Clark, as part of the plan, might have entered the store to assure himself of the fact that Taylor had received the money. It was a circumstance going to show motive for the conspiracy. It was a circumstance that the jury had the right to consider in connection with the other facts, and the court did not err in admitting said evidence.

We have considered all the questions raised in this case, and have been constrained to decide each and every one adversely to appellant. We are of opinion that the record does not disclose any error prejudicial to his legal rights, and therefore the judgment is affirmed.

CRIMINAL EVIDENCE—POSSESSION OF STOLEN PROPERTY.—Possession of stolen property as evidence of guilt: *Matlock v. State*, 25 Tex. App. 654; 8 Am. St. Rep. 451, and note. Possession of recently stolen property is not conclusive evidence of theft, but only a strong circumstance tending to prove the crime: *Taylor v. State*, 27 Tex. App. 463; *Lee v. State*, 27 Tex. 475; *State v. Tucker*, 76 Iowa, 232; *People v. Cline*, 83 Cal. 375. Recently stolen goods being found in the possession of an accused, he must raise a reasonable doubt, at least, as to whether he did not come by them honestly: *State v. Manley*, 74 Iowa, 561; *State v. Whitmer*, 77 Iowa, 557; *People v. Buelna*, 81 Cal. 136. Where one is accused of receiving stolen goods, knowing them to have been stolen, it may be properly proved that he had in his possession at the same time other stolen goods of the same owner, without proving in addition that the accused knew such other goods to have been stolen: *State v. Jacob*, 20 S. C. 131.

ROBBERY.—For a monographic note upon the crime of robbery, its nature, the evidence to prove it, and the indictment necessary to properly charge it, see *State v. McCune*, 70 Am. Dec. 178-191.

EVIDENCE—CONSPIRACY.—The declarations of conspirators are admissible against each and every conspirator, when they are in themselves acts, or explanations of acts, done in the furtherance of the common design and during the existence of the conspiracy: *Martin v. State*, 89 Ala. 115; 18 Am. St. Rep. 91, and note; *State v. Banks*, 40 La. Ann. 736. But where one has ceased to be a conspirator, no falsehood, evasion, or silence on his part can be admitted in evidence: *People v. Irwin*, 77 Cal. 494.

EVIDENCE—OPINIONS.—A witness may state his opinion as to the correspondence of the tracks near the place of an attempted robbery, and the shoes worn by the accused: *Crumes v. State*, 28 Tex. App. 516, *post*, p. 000.

LEVY v. STATE.

[25 TEXAS APPEALS, 203.]

CRIMINAL LAW — MANSLAUGHTER. — UNCOMMUNICATED THREATS are not admissible in evidence to establish manslaughter or to mitigate its punishment. Manslaughter is predicable only upon adequate cause, and facts unknown to defendant cannot enter into and become constituent elements or factors in creating adequate cause.

CRIMINAL LAW — CLOTHING AS EVIDENCE. — Clothing identified as that worn by deceased at the time he was shot is admissible as evidence for the state, although since the shooting it has been given to a party who has had it altered and patches sewed over the bullet-holes therein.

WITNESS, IMPRACHMENT OF. — When a witness denies or fails to remember that on former occasions he made statements inconsistent with his testimony on the trial, evidence that he did make such statements is admissible to impeach him, upon the establishment of a proper and sufficient predicate.

CRIMINAL LAW — MANSLAUGHTER — ADEQUATE CAUSE FOR KILLING. — That one man called another a son of a bitch is not such adequate cause for killing him, by the latter, as will reduce the crime to manslaughter, within the meaning of a statutory term, that "insulting words toward a female relative" constitute "adequate cause" to reduce a killing to manslaughter.

CRIMINAL LAW — SELF-DEFENSE — THREATS. — When defendant provokes the occasion which produces the necessity to take the life of deceased, he cannot rely upon self-defense, nor avail himself of threats made by deceased against his life.

CRIMINAL LAW — MANSLAUGHTER — SELF-DEFENSE. — Where the only inference deducible from the evidence is, that defendant, after seeking the occasion, killed deceased because of his insulting language toward defendant's mother, he cannot rely upon self-defense, no matter whether or not deceased attempted to draw a weapon, or whether defendant shot to save himself from being killed. In either event the crime would be manslaughter, the defendant having had an intent to commit a felony, and having provoked the occasion which produced the necessity to take the life of deceased.

INDICTMENT against M. H. Levy for the murder of J. M. Joiner. Conviction of manslaughter. On the day of the killing, deceased was standing in the street, in front of the saloon of one John Myatt, and was conversing with him and a Mr. Davis. Defendant stepped out of a saloon opposite and across the street, with a gun in his hands, which he held in an attitude to shoot. He advanced to within about forty feet of deceased, presented his gun, and requested Myatt to "get out of the way, John." The latter ran toward defendant, calling upon him not to shoot, but defendant again waved his gun, telling the former to get away, and when Myatt had got within about ten feet of defendant, the latter fired, and killed the deceased. Deceased saw defendant just before he shot, and at-

tempted to escape injury by raising his right arm and bending his body. When examined immediately after the shooting, a five-chambered pistol, loaded all around, was found on the person of deceased. On the day of the homicide, the deceased, in talking with several of the witnesses, had called the defendant "a son of a bitch," and "a son of a whore," and had said to them that he would "kill" him or "fix" him before that night. These were the uncommunicated threats spoken of in the opinion. The other facts are stated in the opinion.

Simmons and Crawford, and Clark, Dyer, and Bolinger, for the appellant.

W. L. Davidson, assistant attorney-general, for the state.

WHITE, P. J. We have maturely considered, weighed, and determined every question raised in the voluminous record before us, and so ably submitted in the brief and oral argument of distinguished counsel for the appellant. Many of these questions will not be noticed further than to remark that under well-settled rules and decisions they either fail to show any error whatsoever, or at most, none of them reversible error, in the rulings complained of. We only propose to discuss such matters as present the most serious issues in the case.

Defendant has been found guilty of manslaughter. Certain evidence with regard to uncommunicated threats was held inadmissible by the court. In our opinion, the proposed excluded evidence, as set forth in the bills of exception, shows vituperative and abusive language about, rather than threats of violence against, the defendant. It could only be cumulative of the great amount of similar evidence which was freely admitted by the court. If the proposed evidence could be fairly construed as threats, still, being uncommunicated, they could not possibly have influenced the conduct of defendant, or had any bearing upon or afford any presumption as to his action in killing deceased, unless there had been a doubt as to which of the parties commenced the attack, in which case such uncommunicated threats would be admissible and proper evidence for the purpose of showing that in all probability the deceased made such attack, and his motive in doing so: Wharieu's Crim. Ev., 9 ed., sec. 757. Such evidence has also been held admissible to corroborate evidence of communicated threats previously admitted: *Holler v. State*, 37 Ind. 57; *Cornelius v. Commonwealth*, 15 B. Mon. 539; *Horrigan*

and Thompson on self-defense, 568, 569. But such evidence could possibly have no weight in establishing manslaughter or in mitigating its punishment, because manslaughter is predicable only upon "adequate cause," and facts unknown to the defendant cannot enter into and become constituent elements or factors in creating "adequate cause." But as stated above, the proposed evidence, as it is set forth, cannot by any fair construction of language be denominated threats, or indeed anything more than vulgar and abusive epithets; and such being their character, they were properly excluded, because uncommunicated, and affording no light as to the homicide. There was any amount of such evidence admitted.

Clothing worn by deceased at the time he was shot was permitted to be produced in evidence before the jury. Such evidence was admissible and proper: *King v. State*, 18 Tex. App. 277; *Hart v. State*, 15 Tex. App. 202; 49 Am. Rep. 138, and authorities cited. See also *Helley v. State*, 75 Ala. 14; *James v. State*, 65 Ga. 508; *People v. Hong Ah Duck*, 61 Cal. 391; *Commonwealth v. Brown*, 121 Mass. 69; *McDonel v. State*, 90 Ind. 320; *Story v. State*, 99 Ind. 413; 8 Crim. Law Mag. 640. Deceased's coat was identified beyond question as the one worn by him on the fatal occasion. It had been given to a negro, who had worn it since it had come into his possession, and he had cut off the skirt of the coat, and his wife had sewed patches over the bullet-holes in the side and breast. There was not the slightest evidence, however, that there had been any illegal or unwarranted tampering with said coat, nor is there any pretense that it did not show the character and location of the bullet-holes just as they appeared upon it the day of the homicide.

When defendant's witness Ditto was upon the stand, the prosecution, for the purpose of laying a predicate to contradict his testimony, asked him on cross-examination, fixing time, place, and parties, if he did not tell Matt Oldham that he did not see the killing of Joiner by Levy, and that he knew nothing about it; to which the witness replied that he "did not remember whether he did or not." And again, fixing time, place, and parties, the witness was asked if he did not tell Matt Oldham that he did not see Levy shoot Joiner, and did not know anything about the killing, and was glad of it, as he did not wish to be a witness in the case; to which the witness replied that he "does not remember telling Matt Oldham any such thing." Matt Oldham was called by the state, to

prove that the above statements were made by said witness Ditto. Defendant objected to such contradictory evidence, upon the ground that it is only upon a denial, direct or qualified by the witness, that he had made such statements; that proof of his having done so was authorized and allowable. The court overruled the objection, and permitted the contradictory statements to be proved. This was not error. In *Walker's Case*, 17 Tex. App. 16, it was held that "when a witness denies or fails to remember that on former occasions he made statements inconsistent with his testimony on the trial, evidence that he did make such statements is admissible, upon the establishment of a proper and sufficient predicate."

Upon the admissibility of this character of evidence, the supreme court of Alabama say: "The rulings in such cases have not been uniform. Phillips, in his work on evidence, says that Tindal, C. J., in a case before him, 'said he had never heard such evidence admitted in contradiction, except where the witness had expressly denied the statement,' and he rejected the evidence; and on another occasion, Lord Abinger, C. B., expressed a similar opinion. But Parke, B., in a case before him, held that contradictory statements of a witness could be introduced to impeach his evidence, though in order to lay a foundation for them, and to enable the witness to explain them, 'a proper predicate must be laid. If the witness admits the conversation imputed to him, there is no necessity to give further evidence of it; but if he says he does not recollect, that is not admission, and you may give in evidence on the other side to prove that the witness did say what was imputed, always supposing the statement to be relevant to the matter at issue'": 2 Phillips on Evidence, 4th Am. ed., with Cowen and Hill's and Edwards's notes, 959; 960.

We agree with Mr. Phillips that the ruling of Baron Parke is the most sound and fittest to be followed. If the rule were otherwise, it might happen that, under the pretense of not remembering, a witness who has made a false statement, and knows it to be false, would escape contradiction and exposure. This particular question seems rarely to have come up in American courts whose decisions are reported. We find, however, that in Vermont the rule corresponds with that adopted by Baron Parke: *Holbrook v. Holbrook*, 30 Vt. 433. "If the witness says he has no recollection of having made such contradictory statements, they may be proved": *Payne v. State*, 60 Ala. 80. See also *Williams v. State*, 24 Tex. App. 637.

The only other matters we propose to discuss are the complaints that have been urged to the charge of the court as given, and the refusal of certain requested instructions propounded in behalf of the defendant.

It is urgently insisted that the charge upon manslaughter was erroneous, in that it restricted "adequate cause" alone to insulting language used by the deceased towards or about the defendant's mother. Defendant has been found guilty of manslaughter, and in our opinion, if manslaughter be in the case made by the facts, it rests solely upon the insulting language of deceased about or towards the defendant's mother. Defendant's language used at the instant after he fired the fatal shot, as testified to by his witnesses Ditto and Darwin, "I am no son of a bitch, and my mother is no whore," most clearly indicates his motive in and the cause which impelled him to commit the homicide. Some of the state's witnesses also say that Levy remarked, "I am no son of a bitch"; "he can't call me a damned son of a bitch." If these latter were, either of them, the cause of the killing, then to use such expression about another would not come within the legal meaning of our statutory terms "insulting words toward a female relative," and would not be adequate cause to reduce a killing to manslaughter: *Simmons v. State*, 23 Tex. App. 653; Willson's Crim. Stats., sec. 1022.

It is objected that the sixteenth paragraph of the court's charge is not sufficiently full. The court's instruction was: "If defendant sought Joiner, and brought on the difficulty with him and killed him, then in such case the defendant cannot rely on self-defense, and cannot avail himself of threats made against his life." It is insisted that this instruction is incomplete, in that it should have been further supplemented by the additional converse proposition, that "if defendant sought Joiner, not for the purpose of provoking a difficulty with him, but to ask him to refrain from further talking of and about him, or to retract some abusive language he had used towards defendant, or for any other innocent purpose, and that Joiner, before any act done or word spoken by defendant, made a hostile demonstration as if to draw a weapon, and defendant then killed him, that then defendant's right of self-defense would not be impaired or lost." And upon the same subject, it is claimed for error that the court refused defendant's second requested instruction, to the effect "that if defendant, after being informed of the vile and opprobrious

epithets and language used by deceased towards him, and of the serious threats to take his life, armed himself with a shotgun and sought an interview with deceased, not for the purpose of provoking a difficulty with deceased, and doing him serious bodily harm, or taking his life, and that he only carried the gun for his own protection, and that as soon as Joiner saw him (defendant) he made a hostile demonstration, as if to draw a weapon, and defendant thereupon shot and killed him in his own necessary self-defense, you will find defendant not guilty." In our opinion, the evidence did not call for or warrant these additional instructions. They announce sound principles, if they were only applicable to the facts.

We have seen that from the language used by defendant the instant after the killing, the only inference deducible is, that he killed deceased because of his insulting language concerning his mother. If that was the provocation, and he sought the occasion, with the intention to avenge the insult by killing deceased, then it matters not, his own intention being to commit a felony, whether deceased attempted to draw a weapon or not, or whether he shot to save himself from being killed; the defendant could not claim self-defense in such state of case, but his crime would be, in either event, manslaughter, he having provoked the occasion which produced the necessity to take the life of deceased.

Did he seek deceased with the innocent intention of inducing or persuading him to retract his abusive language, and did he carry his double-barreled shotgun, loaded with deadly buckshot, as a means of persuasion, or of protection? Deceased had sent him not only most abusive and insulting messages, but had also said that he intended to kill defendant before night. Defendant knew his desperate character, and that he was a man likely to execute his threats. He not only had received these messages, but it is further shown in the testimony that just after he was informed of them he was in such proximity to the deceased that he must have heard in person the additional revilings and denunciations which the enraged man, doubly infuriated by his drunkenness, continued to breathe forth unceasingly. He can stand it no longer. He goes off some distance, gets his trusty shotgun, already loaded, comes back, sees his deadly enemy across the street, and advances towards him with his gun ready to present. The party conversing with deceased sees him, and starts to intercept, and begs him not to shoot. Defendant waves him

away, and tells him to stand aside, and without one word to deceased, fires upon him. If his intentions were peaceable, and his mission an innocent one, why not apprise deceased of it? Especially so when, if it be true, he saw that deceased, mistaking his motives and purposes, was apparently preparing to draw a deadly weapon upon him.

Under these circumstances, can there be the slightest doubt that defendant intentionally provoked the occasion which produced the killing? If so, there can be no self-defense in his case. A person cannot avail himself of a necessity which he has knowingly and willfully brought upon himself: *Willson's Crim. Stats.*, sec. 981; *Thumm v. State*, 24 Tex. App. 667; *Allen v. State*, 24 Tex. App. 216.

Our conclusion upon the whole case is, that the law has been fairly and justly administered on the trial in the court below, and no reversible error having been made to appear on the record before us, the judgment is affirmed.

HOMICIDE — UNCOMMUNICATED THREATS. — As to the admissibility of uncommunicated threats, see note to *Campbell v. People*, 61 Am. Dec. 55-58; *Keener v. State*, 18 Ga. 194; 63 Am. Dec. 269; *State v. Turpin*, 77 N. C. 473; 34 Am. Rep. 455. Evidence of previous uncommunicated threats is admissible in cases where it is doubtful who was the aggressor, as tending to solve such doubt: *Johnson v. State*, 66 Miss. 189; *Bell v. State*, 66 Miss. 192; *Hart v. Commonwealth*, 85 Ky. 77; 7 Am. St. Rep. 576, and note.

HOMICIDE — CORPUS DELICTI. — As to proof of *corpus delicti* in cases of manslaughter, etc., see note to *State v. Williams*, 78 Am. Dec. 255-257.

HOMICIDE — PROVOCATION. — Words, however aggravating, are not considered sufficient provocation to extenuate the killing of a person, so as to reduce the killing to manslaughter: *Commonwealth v. York*, 9 Met. 92; 43 Am. Dec. 373; *Commonwealth v. Webster*, 5 Cush. 295; 52 Am. Dec. 711; *Steffey v. People*, 130 Ill. 98; *State v. Elliott*, 98 Mo. 151.

HOMICIDE — WHEN ACCUSED MAY NOT SET UP PLEA OF SELF-DEFENSE. — The accused cannot set up the plea of self-defense when he provoked the combat in which it became necessary to kill his adversary: *Steffey v. State*, 15 Ohio St. 47; 86 Am. Dec. 470; *State v. Benham*, 23 Iowa, 154; 92 Am. Dec. 417; *State v. Rogers*, 18 Kan. 78; 26 Am. Rep. 754; *Gibson v. State*, 80 Ala. 121; 18 Am. St. Rep. 96, and note; note to *People v. Lennon*, 15 Am. St. Rep. 262, 263.

REAGAN v. STATE.

[28 TEXAS APPEALS, 227.]

CRIMINAL LAW — ATTEMPT TO RAPE. — INDICTMENT charging an attempt to commit rape, by threats alone, is sufficient without especially alleging that the threats were directed against the female upon whom the attempt was made.

INDICTMENT — JOINDER OF OFFENSES — DUPLICITY. — Two or more distinct offenses may be joined in one indictment under separate counts without its being open to the objection of duplicity, which occurs when two or more distinct crimes are joined in one count.

NEW TRIAL — ABSENCE OF WITNESS who has been summoned by attachment to appear at the trial is not, after conviction, ground for a new trial. It is only ground for continuance.

NEW TRIAL ON GROUND OF NEWLY DISCOVERED EVIDENCE will be denied, when the record clearly shows that the evidence was accessible upon the trial by the exercise of due diligence.

CRIMINAL LAW — ATTEMPT TO RAPE. — **SPECIFIC INTENT** to rape is an absolutely essential ingredient to an attempt to rape, and must accompany the means used to effect the crime.

CRIMINAL LAW — ATTEMPT TO RAPE — DRUNKENNESS DEPRIVING ACCUSED OF INTENT. — A specific intent to rape must accompany the means used to effect an attempt to rape, and if the prisoner's mental faculties were so overcome by intoxication at the time of the attempt that he was not conscious of what he was doing, or if his actions and the means used were naturally calculated to effect his purpose, still if, from intoxication, he had not sufficient capacity to entertain the intent, such intent cannot be inferred from his acts. If, however, he retained sufficient mental capacity to know what he was doing, and why he was doing it, then the attempt to rape may be inferred from his acts, the same as if he were sober.

Goodrich and Clarkson, and W. Shelton, for the appellant.

W. L. Davidson, assistant attorney-general, for the state.

HURT, J. This is a conviction for an attempt to rape.

There are two counts in the indictment. The first charges an assault with the intent to commit rape. The second charges an attempt to commit rape. The first is sufficient for an assault with intent to commit rape. Is the second count sufficient for an attempt to rape? Counsel for appellant contends that it is not, the objection being that as this count charges that the rape was attempted alone by threats, it should have been alleged that the threats were directed against the person of the prosecutrix. This is not necessary: See definition of rape, Pen. Code, art. 528. And further, the court must give in charge article 530 of the Penal Code, defining the threat required by the statute.

It is urged by counsel for appellant that only under an in-
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dictment for rape can the accused be convicted of an attempt to rape. We hold to the contrary: *Melton v. State*, 24 Tex. App. 284.

There is no duplicity in the indictment. This objection to an indictment applies when two or more distinct offenses are joined in one count. Two or more distinct offenses may, under proper circumstances, be joined in one indictment. This, however, must ordinarily be done in separate counts. In this case we have two counts, — one for an assault with intent to rape, and the other for the attempt.

It appears from the record that one Felix Diaz had been in attendance upon the court at the trial term as a witness for the defendant, in obedience to a subpoena, until August 1st. Neither the witnesses for the state nor defendant being present, an attachment was issued and executed on the second day of August. When the parties were called upon to announce, the sheriff stated to counsel for defendant that Diaz had been attached, and would be in attendance upon the court. Counsel for defendant, believing this to be true, announced ready for trial. Diaz did not attend, and defendant, being convicted, brings forward this matter as a ground for new trial, stating in the motion the facts expected to be proved by Diaz.

Conceding for the argument the materiality of the facts, still the court did not err in refusing a new trial upon this ground, because at some time before the evidence was concluded the appellant discovered that Diaz was not present, if in fact he needed him. Now, under this state of case it was the duty of appellant to move to withdraw his announcement, and to continue or postpone the case, setting out in his motion all the facts as well as the testimony expected from Diaz. This rule of practice is well settled.

The motion for new trial relied upon testimony discovered after the trial. From an inspection of the record it clearly appears that this testimony could have been ascertained, if indeed the appellant was not aware of the facts himself. He had visited the house in company with Diaz, knew its character and its occupants, and could have procured the attendance of several witnesses who would have testified to all the facts stated in the affidavits filed in support of his motion.

There is very cogent testimony tending to show that appellant was very drunk at the time he made the attempt. The court gave in charge to the jury the statute relating to drunkenness, which reads: "Neither intoxication, nor temporary insan-

ity of mind produced by voluntary recent use of ardent spirits, shall constitute any excuse in this state for the commission of crime, nor shall intoxication mitigate either the degree or the penalty of crime; but evidence of temporary insanity produced by such use of ardent spirits may be introduced by the defendant in any criminal prosecution in mitigation of the penalty attached to the offense for which he is being tried, and in cases of murder, for the purpose of determining the degree of murder of which the defendant may be found guilty": Pen. Code, art. 40 a; Willson's Crim. Stats., sec. 92.

Appellant requested the following charge: "The jury may take into consideration the evidence before them as to the drunkenness of the defendant at the time of the assault (if any was made) in determining whether the defendant had, at the time, the specific intent to commit the offense of rape as that offense is defined in the charge of the court." This requested instruction was refused, and the defendant excepted.

Let us return to article 40 a. It is seen that neither insanity nor intoxication produced by the voluntary recent use of ardent spirits shall be an excuse for crime. This is the common law, and the law of common sense. Acts may be excused, but there can, in the very nature of things, be no excuse for crime. For if indeed appellant attempted to rape Mrs. Reagan, in morals as in law, there is no excuse.

But it may be contended that the statute means that proof of insanity or intoxication so produced shall not be used to negative—disprove—the specific intent to ravish. The specific intent to rape must accompany the means used to effect the rape. The intent is an absolutely essential ingredient of the offense, without which, though the means may have been used, there can be no attempt to rape. Now, then, has the legislature eliminated this ingredient in all cases in which the defendant is temporarily insane from the use of ardent spirits,—insane or so drunk from the voluntary recent use of ardent spirits as to be incapable of forming the intent? If so, then the offense is complete without the specific intent, such insanity or drunkenness being substituted for the intent. We will not believe this to be the intention of the legislature until it is expressed in plain and unquestionable language.

This we deem a correct rule, and it is well settled that if the offense consists of an act combined with a particular intent, it is as necessary to prove the intent as to prove the act, and the intent must be found by the jury as matter of fact,

before a conviction can be had. Especially is this so when the offense, consisting of the act and the intent, constitutes, as in this case, an attempt to commit a higher offense than that charged. "And as the particular intent charged must be proved to the satisfaction of the jury (beyond a reasonable doubt), no intent in law, nor mere legal presumption, differing from the intent in fact, will be allowed to supply the place of the latter": *Roberts v. People*, 19 Mich. 402; *Rex v. Thomas*, 1 East P. C. 417; 1 Leach, 330; *Rex v. Holt*, 7 Car. & P. 518; *Cruses's Case*, 8 Car. & P. 541; *Rex v. Jones*, 9 Car. & P. 258; *Regina v. Ryan*, 2 Moody & R. 213; *Ogletree v. State*, 28 Ala. 693; *Maher v. People*, 10 Mich. 212; 81 Am. Dec. 781; *People v. Scott*, 6 Mich. 296; *Loza v. State*, 1 Tex. App. 488; 28 Am. Rep. 416. Our statute above quoted declares that intoxication shall be no excuse for crime, etc. If a crime has not been committed, the statute is inapplicable. No excuse is needed until a crime has been committed.

Now, as bearing upon the question as to whether the attempt was committed with the intent to ravish, it was material to inquire whether the defendant's mental faculties were so far overcome by the effects of intoxication as to render him incapable of entertaining the intent, and for this purpose it was the right and duty of the jury to take into consideration the nature and circumstances of the attempt, the actions, conduct, and demeanor of the defendant, his declarations before, at the time of, and after the attempt, and especially to consider the nature of the attempt, and what degree of mental capacity was necessary to enable him to entertain the intent to rape.

The question we are considering relates solely to the capacity of the defendant to entertain the particular intent. It is a question rather of the exercise of the will than of reasoning powers, and as matter of law, the jury should have been instructed that if defendant's mental faculties were so far overcome by intoxication that he was not conscious of what he was doing, or that if his actions and the means used were naturally adapted or calculated to effect his purpose, still, if he had not sufficient capacity to entertain the intent to ravish Mrs. Regian, in that event they should not infer that intent from his acts. But if he knew what he was doing, and why he was doing it, and his actions and the means used were naturally adapted or calculated to effect his purpose, then the attempt to rape might be inferred from his acts in the same manner as if he were sober.

Appellant is not to be held responsible for the intent if he was too drunk for a conscious exercise of the will to the particular end; or in other words, too drunk to entertain the intent, and did not entertain it in fact. If he did in fact entertain it, though but for the intoxication he would not have done so, he is responsible for the intent as well as for the acts.

We are of the opinion that the requested instructions should have been given.

The judgment is reversed, and the cause remanded.

DRUNKENNESS AS AN EXCUSE FOR CRIME: See note to *Flanigan v. People*, 40 Am. Rep. 560-570; *Walker v. State*, 85 Ala. 7; 7 Am. St. Rep. 17, and note collecting cases upon the question of when drunkenness lessens accountability for crime. The general rule is, that drunkenness is no excuse for crime: *State v. Shore*, 31 W. Va. 491; 13 Am. St. Rep. 875; but it is erroneous to instruct the jury that "drunkenness can never be received as a ground to excuse or palliate a crime," because when and how far drunkenness may excuse or palliate depends upon its degree and its effect upon the mind: *Goliher v. Commonwealth*, 2 Duvall, 163; 87 Am. Dec. 493. Drunkenness may incapacitate one from entertaining a felonious intent: *Losa v. State*, 1 Tex. App. 488; 28 Am. Rep. 416, and foot-note; *Wood v. State*, 34 Ark. 341; 36 Am. Rep. 13. In *State v. Carter*, 98 Mo. 177, it was decided that voluntary drunkenness could never excuse or even mitigate a crime committed under its influence; but in *Engelhardt v. State*, 88 Ala. 100, the rule is laid down that where the question of malice or intent is involved, the fact of drunkenness is admissible to reduce the grade of the offense; to the same effect is *Buckhannon v. Commonwealth*, 86 Ky. 110; *People v. Murray*, 72 Mich. 10.

JOINDER OF OFFENSES IN ONE INDICTMENT. — While an indictment which charges two or more offenses in one count is bad for duplicity: *Ben v. State*, 22 Ala. 9, 58 Am. Dec. 234, and note; yet several offenses charged in separate counts may be joined in one indictment: Note to *Ben v. State*, 58 Am. Dec. 247.

HARRIS v. STATE.

[28 TEXAS APPEALS, 808.]

CRIMINAL LAW — INFANTICIDE. — To warrant the conviction of a mother of infanticide, it must be proved that the child was born alive; that it had an existence independent of its mother; and that afterwards its life was destroyed by her act, agency, or procurement.

CRIMINAL LAW — CORPUS DELICTI — CONFESSIONS. — The *corpus delicti* consists not merely of an objective crime, but also of defendant's agency in the crime; and unless it is proved in both these respects, a confession by the defendant is not of itself enough to sustain a conviction. The confession must be corroborated. This may be done by circumstantial evidence.

W. L. Davidson, assistant attorney-general, for the state.

WHITE, P. J. Appellant has been convicted of the murder of her infant babe, and her punishment has been assessed at a life term in the penitentiary.

We are of opinion that the evidence establishing the *corpus delicti* is not sufficient to sustain the judgment, in so far as the same is made to appear in the record here before us. To warrant a conviction, it was necessary for the state to prove that the child was born alive; that it had an existence independent of the mother; and that afterwards its life was destroyed by the act, agency, or procurement of its mother, this defendant: *Wallace v. State*, 7 Tex. App. 570; 10 Tex. App. 255; *Sheppard v. State*, 17 Tex. App. 74.

Defendant confessed that the child was born on Sunday night; that it was born alive; that she put it into Dr. Baldwin's spring, and that it was alive when she put it in the spring. The child was found the following Wednesday. Now, if the defendant's confessions were sufficient by themselves, perhaps we might hold that the *corpus delicti* had been sufficiently proved. These, however, in and of themselves, are not sufficient. The *corpus delicti* consists not merely of an objective crime, but of the defendant's agency of the crime; and it is well settled that unless the *corpus delicti* in both these respects is proved, a confession is not, by itself, enough to sustain a conviction. It must be corroborated. This can seldom be done by direct or positive testimony, but it may as well be shown by circumstantial evidence: *Willard v. State*, 27 Tex. App. 386.

Now, what was the corroboration in this case? The doctor who testified as an expert says: "I cannot say positively whether the child was ever alive, or whether it had ever breathed." He dissected the child's head, and found that the skull had not been fractured. He took out the lung and applied the hydrostatic test and found air in it, the usually accepted test that it had breathed. This was sufficient corroboration as to the fact that the child was born alive. Concede that the child had been born alive. Was it killed, or was it drowned? Evidently the doctor does not think it was killed by violence. As to the chances and probabilities that it had been drowned, he does not say one word. Why did not he make an examination, and give his opinion as to the fact of drowning? What evidence of drowning is there outside the confession? Was the child found in Dr. Baldwin's spring? If so, who found it there, and under what circumstances?

Was Dr. Baldwin's spring of sufficient depth to drown the child? Was the spring in a public or secluded place? All these facts might have been testified to, and yet the record contains no such evidence. The first it discloses of the body is, that somebody had found it, and it was under a box near the spring. Who found it in and took it out of the spring?

Before we are asked to sanction so serious a verdict and judgment, even on the confession of a defendant, there ought to be furnished us some circumstances tending to corroborate that confession, since the law will not permit a conviction to stand alone upon the confession.

In this case, because the evidence is insufficient to establish the *corpus delicti*, the judgment is reversed, and the cause is remanded.

CORPUS DELICTI — CONFESSIONS. — The confessions of an accused, when the *corpus delicti* is not proved by other testimony, are insufficient to warrant a conviction of a felony: *Matthews v. State*, 55 Ala. 187; 28 Am. Rep. 698; *State v. German*, 54 Mo. 526; 14 Am. Rep. 481, and note; note to *State v. Williams*, 78 Am. Dec. 254, 255.

JACKSON v. STATE.

[28 TEXAS APPEALS, 370.]

CRIMINAL LAW — BURGLARY. — POSSESSION OF STOLEN GOODS. — Without other evidence of guilt, is not *prima facie* evidence of burglary; but where goods have been taken by a burglar, and are immediately, or soon after, found in the actual and exclusive possession of a person who gives a false account or refuses to give any account of the manner in which the goods came into his possession, proof of such possession and guilty conduct will sustain the inference, not only that he stole the goods, but that he also made use of the means by which access to them was obtained.

CRIMINAL LAW — BURGLARY. — POSSESSION OF RECENTLY STOLEN PROPERTY. — Possession of recently stolen property, to warrant an inference of guilt of burglary, must be personal and exclusive, unexplained, and must involve a distinct and conscious assertion of property by the accused.

CRIMINAL LAW — BURGLARY — EVIDENCE. — Where a conspiracy between two to commit a burglary is established, evidence of the finding of the fruits of the crime at the house of either of the conspirators subsequently to the burglary, and what transpired at the time, is admissible and legitimate as tending to connect the conspirator on trial with the crime, although neither of them was present when such fruits of the burglary were found.

CRIMINAL LAW — BURGLARY — RIGHT OF JURY TO INSPECT EVIDENCE OF CRIME. — Where the evidence concerning the identity of a sack found in the house of the accused, as one of the sacks stolen at the time of the burglary, is conflicting, the jury is entitled to a personal inspection of the

sack in the presence of the court, counsel, and parties. In such case the jury is not entitled to an inspection after they retire from the courtroom.

CRIMINAL LAW — EVIDENCE. — All materials in any way part of the *res gestæ* may be produced as evidence on the trial.

J. M. Richards and G. A. McCall, for the appellant.

W. L. Davidson, assistant attorney-general, for the state.

WHITE, P. J. This is the second appeal in this case. On the former appeal the judgment was reversed, and the cause remanded, on account of certain defects in the charge of the court, which were pointed out: *Jackson v. State*, 28 Tex. App. 143.

On the second trial, the learned judge corrected his former charge in these particulars, and although several objections are again strenuously urged to the charge, we will, without discussing them, say that in our opinion they are not well taken, and that the charge as now presented is a sufficient exposition of the law applicable to the facts. But one special instruction was asked by the defendant, in addition to the general charge, and it was given.

Appellant has been tried for and convicted of burglary. A strong criminative fact against him was the finding in his house, a few days after the burglary, one of the seamless sacks identified by the state's witnesses as one of the sacks containing the wheat stolen from the burglarized house. The burglary was committed on the night of August 20th, and the sack was found in defendant's house on the 28th of August, following, or seven days afterwards. At the time it was found, defendant had been arrested, and was in jail. He has never attempted to explain his possession of the sack. His wife stated that it was his, defendant's, that he had had it for several months, and that he had brought it home filled with peaches, from Edwards's place, while he was working at Edwards's.

Had this been the only criminative or inculpatory fact against the defendant, there might have been some question as to the sufficiency of the evidence to support a conviction for burglary.

" Mere possession of goods stolen, without other evidence of guilt, is not to be regarded as *prima facie* evidence of burglary. But where goods have been feloniously taken by means of a burglary, and they are immediately or soon after found in the actual and exclusive possession of a person who gives a false

account or refuses to give any account of the manner in which the goods came into his possession, proof of such possession and guilty conduct may sustain the inference, not only that he stole the goods, but that he made use of the means by which access to them was obtained. There should be some evidence of guilty conduct besides the bare possession of the stolen property, before the presumption of burglary is superadded to that of the larceny": Wharton's *Crim. Law*, 8th ed., sec. 818; Wharton's *Crim. Ev.*, 9th ed., sec. 736; 2 *Am. & Eng. Ency. of Law*, 694.

In Georgia, and perhaps in some of the other states, it is held that recent possession, by a person who is unable to account for his possession, raises a presumption of guilt, and would authorize the jury to find a verdict of guilty: *Lundy v. State*, 71 Ga. 360.

With us, the rule is the same as in theft; that is, that "to warrant an inference of guilt of theft from the circumstance of possession of recently stolen property, such possession must be personal and exclusive, must be unexplained, and must involve a distinct and conscious assertion of property by the defendant": *Field v. State*, 24 Tex. App. 422; citing Willson's *Crim. Stats.*, sec. 1299; *Morgan v. State*, 25 Tex. App. 513; *Jackson v. State*, 28 Tex. App. 143. And this seems to be the rule in Alabama: *White v. State*, 72 Ala. 195.

In this case, defendant did not explain nor attempt to explain his possession, though his wife did, or attempted to do so for him. What are the other inculpatory and criminative facts?

One Kilby, a brother-in-law of defendant, was implicated in the burglary, and the evidence of Kilby's guilt, as shown by the record, is, to our minds, overwhelming. Defendant was staying at Kilby's house. He had previously worked at Edwards's place during the harvest, and knew the premises. At sundown on the evening of the 20th of August he was seen in an empty two-horse wagon with Kilby, going in the direction of Edwards's. The next morning, at sunrise, Kilby and another party are at the mill, where Kilby sells the stolen wheat, and takes in part pay a hundred-pound sack of flour. The purchaser does not know or identify defendant as the man who was with Kilby, but several witnesses met Kilby and Jackson, this defendant, as they were returning from Weatherford, between nine and ten, A. M., after the sale of the wheat, in a two-horse wagon; and one testifies that he saw the

sack of flour in the wagon, and that Kilby told him they were going to have biscuits, and asked him to come over and see him. These witnesses knew Jackson, this defendant, and identified him as the party with Kilby. In addition to these facts, one of the seamless sacks which contained a part of the wheat stolen from the burglarized house was, as we have seen, found at defendant's house. This sack was fully and completely identified by the alleged owners, and other witnesses for the state. We think the evidence amply sufficient to show a conspiracy, and acting together as principals, by Kilby and defendant in the criminal enterprise, and to warrant the inference that defendant was a party to and guilty of the burglary.

But it is insisted that the court erred in allowing evidence to go to the jury of the finding of the sack and what transpired at the time, the defendant not being present. This evidence was admissible and legitimate as a circumstance tending to connect defendant with the burglary, the sack being one of the fruits of the crime: *Burrill on Circumstantial Evidence*, 445, 447.

For the same reason it is objected that the court erred in allowing evidence of the finding of some of the stolen sacks at the house of Kilby several days after the commission of the burglary, when neither Kilby nor defendant were present, and the additional objection urged to this evidence is, that the sacks were found after the conspiracy (if any had ever existed between defendant and Kilby) had been consummated, and that no act or fact connecting Kilby with the crime, done or ascertained after consummation of the conspiracy, could be used as evidence against or affecting this defendant. As stated above, the evidence, in our opinion, amply established the conspiracy and acting together of the parties in the crime. The sacks found at Kilby's were fruits of the crime, and "any fact or circumstance which would tend to prove the guilt of the co-defendant would also tend to prove the guilt of the defendant, and would be admissible against him": *Pierson v. State*, 18 Tex. App. 524.

But again, on the trial, the sack found at defendant's house was claimed by several witnesses to be marked with the initials of Edwards's name, viz., "N. G. E.," and "W. F. r. D.," — an abbreviation for the town of Weatherford; and the letter "E," on the edge of the mouth of the sack, was claimed to have been worked with thread by Mrs. Edwards. Edwards testified that when he purchased the sacks in Dallas they

were full of corn, and that the party from whom he purchased them marked his (Edwards's) initials and the abbreviation of Weatherford with lampblack upon them. It was proved that after the sack was found at Jackson's, his wife, Mrs. Jackson, had washed it and almost obliterated these letters in lampblack; and Varner, the constable, testified that when he found the sack at Jackson's, he saw the letter "E" in thread near the mouth, and commenced picking it out with his knife, when he was stopped by Moreland, who also testified to the same fact. On the trial, the witnesses Edwards and two or more other state's witnesses examined the sack, and swore that they could still see these initials and marks upon the sack. Defendant had the sack put in the hands of other witnesses, who examined it carefully, and they swore they could see no letters, or anything like letters, upon it.

The prosecution then proposed to let the jury examine and inspect it for themselves, and this the court permitted, over defendant's objections. It is insisted that "there was an irreconcilable conflict in the evidence as to the marks on the sack, and that the jury ought to have decided the same on the evidence of the witnesses, and not from a personal examination and inspection by the jury themselves." The testimony of the witnesses concerning the sack was all before the court, and in the presence of the jury, and was heard by them. The sack itself was before them when the witnesses were testifying about it.

This is not like the case of "a view" by the jury when neither the court nor the parties are present, and which proceeding would be illegal, and might be prejudicial to the rights of a defendant: *Smith v. State*, 42 Tex. 444. On the contrary, everything about and concerning the matter transpired in the court, at the trial, and in the presence and hearing of court, counsel, parties, and jury. They all saw and heard what the witnesses had to say, and the parties fully examined and cross-examined them in connection with the sack, which was exhibited, examined, and inspected by the witnesses when testifying.

This identical question came up in *Wynne v. State*, 56 Ga. 114, when there was a conflict between witnesses as to the physical appearance of a pistol and cartridges used in the difficulty about which the trial was being had. The court say: "We think the court should have permitted the jury to have and inspect the pistol. . . . We can see no objection

to the pistol being exhibited to the jury, and inspected by them."

All materials in any way part of the *res gestæ* may be produced as evidence on the trial: Wharton's Crim. Ev., 9th ed., sec. 312, and note; *McDonel v. State*, 90 Ind. 320; *Hart v. State*, 15 Tex. App. 203; 49 Am. Rep. 188; *Levy v. State*, 28 Tex. App. 209; *ante*, p. 826.

Mr. Wharton says: "As we have seen, it is one of the necessary incidents of bringing into court instruments by which an act is alleged to have been done that such instruments should be tested in open court. It is only where this is done by the jury after they retire, when parties have no opportunity of revising the process, that objection can be made. When the process is conducted openly, as part of the trial of the case, it is a valuable auxiliary in the discovery of the truth": Wharton's Crim. Ev., 9th ed., sec. 314, and note.

Under the circumstances exhibited in the bill of exceptions, we see no error in allowing the jury to examine and inspect the sack for themselves. We think it was legitimate to permit them to do so, in order that they might, with the sack before them, see and determine the conflict in the evidence concerning the marks, letters, and figures upon it.

We have examined this record maturely in the light of the able brief and oral argument of counsel for appellant, and have been unable to find any error of sufficient importance to demand or require of us a reversal of the judgment, and it is therefore affirmed.

ON THE FIRST APPEAL in this case, *Jackson v. State*, 28 Tex. App. 143, the judgment was reversed, and the cause remanded for a new trial for the failure of the trial court to give proper instructions. The court said: "It was proved that one of the sacks stolen at the time of the burglary was recently thereafter found in defendant's house. This evidence having been admitted, it was the duty of the court to instruct the jury, as a part of the law of the case, that to warrant an inference of guilt from the circumstance of possession of recently stolen property, such possession must be personal and exclusive, must be unexplained, and must involve a distinct and conscious assertion of property by the defendant: *Meld v. State*, 24 Tex. App. 422. No such instruction was given. Again, it was proved that some of the stolen sacks were found in the house of one Kilby, recently after the burglary. With respect to this testimony, the court should have instructed the jury that it could not be considered against the defendant, unless it was further proved that said Kilby and the defendant acted together in the commission of the burglary: *Pierson v. State*, 18 Tex. App. 524; and not then, unless it was shown that Kilby had personal and exclusive possession of said sacks, unexplained, etc. In the particulars mentioned, we think the charge

of the court is fundamentally erroneous, and we must therefore reverse the judgment."

CRIMINAL LAW. — POSSESSION OF STOLEN PROPERTY as evidence of guilt: See *Clark v. State*, 28 Tex. App. 189; *ante*, p. 000, and note.

CONSPIRACY — POSSESSION OF STOLEN PROPERTY BY ONE OF THE CONSPIRATORS. — Having established a conspiracy between persons to commit robbery, it is competent to show possession of the stolen property in the accused's co-conspirator: *Clark v. State*, 28 Tex. App. 189; *ante*, p. 817.

EX PARTE GARZA.

[28 TEXAS APPEALS, 381.]

MUNICIPAL CORPORATIONS — POWER TO REGULATE DOES NOT INCLUDE POWER TO LICENSE. — Power granted a municipal corporation by charter to restrain, regulate, and inspect houses of prostitution does not include power to license such houses by ordinance, when this power is not expressly granted, and when the charter, in express words, grants the power to license numerous other occupations. This excludes the conclusion that the power to license such houses was intended to be granted, or that it exists by implication.

MUNICIPAL CORPORATIONS — REPEALS BY IMPLICATION. — The presumption is not lightly to be indulged that the legislature has by implication repealed, as respects a certain municipality or all municipalities, laws of a general nature elsewhere in force throughout the state; still, a charter or special act passed subsequent to the general law, and plainly in conflict with it, will, to the extent of the conflict, operate as a repeal of the latter by implication, but such repeals are not favored, and will be applied with extreme caution.

MUNICIPAL CORPORATIONS. — POWER TO LICENSE OCCUPATIONS must be plainly conferred upon a municipality, or it will be deemed not to exist. Any fair, reasonable doubt concerning the existence of the power will be resolved by the courts against the city, and the power denied.

MUNICIPAL CORPORATIONS — POWER TO ENACT ORDINANCES. — In determining the power of a municipal corporation to enact a particular ordinance, the charter by which it is claimed that such power is conferred should receive a reasonable construction, and all reasonable intendments in support of the validity of the ordinance will be indulged.

CONSTITUTIONAL LAW. — Different punishments prescribed by the same statute for different acts constituting the same offense in a different degree, or by different classes of persons, is not objective legislation, nor is such act void for uncertainty in that it prescribes different punishments for the same offense.

L. N. Walthall, and Upson and Bergstrom, for the relator.

W. L. Davidson, assistant attorney-general, for the state.

WILLSON, J. Appellant, Emelia Garza, applied to the judge of the district court of the forty-fifth judicial district of Texas, for a writ of *habeas corpus*, praying to be discharged from custody, in which she is held by Jacob Rips, a policeman of

the city of San Antonio, under a warrant issued out of the recorder's court of said city, for the violation of an ordinance "to suppress and restrain bawdy-houses within the limits of the city of San Antonio." The writ was issued as prayed for, and upon a hearing the writ was dismissed and appellant remanded to the custody of the respondent, from which order the applicant prosecutes an appeal to this court, and assigns the following error: "His honor the judge erred in dismissing the writ of *habeas corpus* and in remanding the applicant for the writ to the custody of the respondent, in this: There is no valid or legal ordinance which authorized the issue of the warrant under and by virtue of which the applicant was arrested and is held in custody."

The ordinance in question is entitled "An ordinance to suppress and restrain bawdy-houses within the limits of the city of San Antonio." It was passed and approved December 16, 1889, and was duly published. It provides for licensing bawdy-houses within the limits of said city, upon the payment of an annual license to the said city of five hundred dollars; and also provides for the licensing of bawds. It also provides for the inspection of bawds, and prescribes penalties for violations of any of the provisions of the ordinance.

It is admitted that appellant violated the ordinance by keeping a bawdy-house without obtaining a license to do so, and that she has been duly charged and arrested, and is now in custody for said violation.

It is further admitted that the license of five hundred dollars annually imposed by said ordinance is reasonable, and does not amount to a tax on the occupation.

Appellant attacks the validity of said ordinance, contending, — 1. That the city was not and is not authorized by its charter to enact it; and 2. That said ordinance is contrary to the general laws of the state, and is therefore void.

By act of August 13, 1870, the city of San Antonio, having a population of more than ten thousand inhabitants, was incorporated by special act of the legislature under authority of section 5 of article 11 of the constitution.

There are three sections in the said act of incorporation under which it is claimed by the city that it had the power to enact the ordinance in question. They are as follows: —

"Sec. 72. To license, tax, and regulate billiard-tables, pin-alleys, ball-alleys; to suppress and restrain disorderly houses, tippling shops and groceries, bawdy-houses, houses of prosti-

tution or assignation, gambling and gambling-houses, lotteries, and all fraudulent devices and practices, and all kinds of indecencies.

"Sec. 78. The city council shall have the right to enact all necessary ordinances to restrain and punish vagrants, mendicants, street-beggars, and prostitutes; to restrain and control all gambling, and punish the keepers of all games and gambling devices with as great a penalty as the same is punished by the statutes of the state. The recorder's court of the city of San Antonio shall have the concurrent jurisdiction of all such misdemeanors when committed in the corporate limits of the city of San Antonio. (Amendment of March 4, 1885.)

"Sec. 98. To prevent and punish the keeping of houses of prostitution within the city, or within such limits therein as may be defined by ordinance, and to adopt summary measures for the removal or suppression, or regulation and inspection, of all such establishments."

It is a settled rule that municipal corporations can exercise no powers but those which are conferred upon them by the act by which they are constituted, or such as are necessary to the exercise of their corporate powers, the performance of their corporate duties, and the accomplishment of the purposes of their association. The charter of a municipal corporation is its organic act, and furnishes the measure of its powers. It can exercise no power which the charter does not grant in express words, or which is not necessarily or fairly implied in or incident to the powers expressly granted, or which are not essential to the declared objects and purposes of the corporation: 1 Dillon on Municipal Corporations, sec. 89; Cooley's Constitutional Limitations, 4th ed., 231, 235.

Such being the extent and limit of the power of a municipal corporation, did the municipality of the city of San Antonio have the power to enact the ordinance in question? Such power is certainly not conferred in express words in its charter. In the sections of the charter which we have quoted, no express power to license houses of prostitution is granted, and there are no other provisions of the charter bearing upon the subject. In *Davis v. State*, 1 Tex. App. 425, which case has been cited, and is relied upon by the city to sustain the validity of said ordinance, the power to license houses of prostitution was granted the city of Waco in express words, and while we adhere to the correctness of that decision, we do not consider it applicable to this case.

It is claimed by the city, however, that although its charter does not in express words confer the power to license houses of prostitution, it does, by necessary implication, confer such power by granting expressly the power to restrain, regulate, and inspect such establishments.

Judge Dillon, in his work on municipal corporations, says: "The presumption is not lightly to be indulged that the legislature has by implication repealed, as respects a particular municipality, or as respects all municipalities, laws of a general nature elsewhere in force throughout the state; yet a charter or special act passed subsequent to the general law, and plainly irreconcilable with it, will, to the extent of the conflict, operate a repeal of the latter by implication. But by a well-known rule, founded on solid reasons, such repeals are not favored, and the principle of implied repeal ought to be applied with extreme caution": 1 Dillon on Municipal Corporations, sec. 88. Again, he says: "The right to license must be plainly conferred, or it will not be held to exist": Sec. 361. And again, he says: "Any fair, reasonable doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied": Sec. 89.

In determining the power of a municipal corporation to enact a particular ordinance, the charter by which it is claimed such power is conferred should receive a reasonable construction,—that is, a construction which accords with the intention of the legislature,—and all reasonable intendments in support of the validity of the ordinance will be indulged: *Gregory v. State*, 20 Tex. App. 210.

Was it the intention of the legislature to confer upon the city of San Antonio the power to license houses of prostitution? At the time of granting the charter of incorporation to said city, houses of prostitution were prohibited by a general law of the state: Pen. Code, arts. 339-341. If it was the intention of the legislature to repeal this general law within the corporate limits of said city, it is reasonable to presume that such intention would have been plainly and expressly declared, and not left to be implied merely. It is reasonable to presume that if it had been intended to grant the power to license such houses, the legislature would, as it did in the charter of the city of Waco, have expressly granted such power. That such was not the legislative intent is also, and to our minds very cogently, shown by the fact that the power to license other occupations, etc., was expressly conferred

upon the city. In section 72 of the charter, one of the sections hereinbefore quoted, the power to license billiard-tables, pin-alleys, and ball-alleys is expressly granted, but as to bawdy-houses, etc., named in the same section, the power to license is not expressly granted; section 73 confers expressly the power to license hackmen, draymen, etc.; section 75 to license hawkers, peddlers, etc.; section 76 to license merchants, hotels, etc.; section 77 to license public balls, etc. And in the sections cited, the power to regulate is also expressly conferred, showing that license and regulation were not considered by the legislature as equivalent terms, or that the power to regulate included the power to license.

We are of the opinion that by no reasonable interpretation or intendment can it be concluded that the legislature intended to grant to the city of San Antonio the power to enact the ordinance in question. Such a power is not necessarily or fairly implied, nor essential to the declared objects and purposes of the corporation. Houses of prostitution may be restrained, regulated, and inspected without being licensed. Thus the city might by ordinance require the keepers of such establishments to close them against visitors during specified hours; or might limit the number of prostitutes inhabiting such houses; or might require that such houses be designated by some sign whereby their character might be known to the public. Various other modes of restraint and regulation might be mentioned which could be adopted and made effectual without licensing such houses.

Counsel for respondent has referred us to some decisions of other states, which we confess support the proposition that the words "regulate" and "restrain" imply the power to license. *State v. Clarke*, 54 Mo. 17, holds that the word "regulate," as used in an ordinance of the city of St. Louis, with reference to bawdy-houses, by necessary implication conferred upon that city the power to license such houses. Two of the five judges deciding the case dissented from that view, and one of the dissenting judges delivered an opinion which to our minds advances very strong if not conclusive arguments against the correctness of the conclusions of a majority of the court. It is to be observed, however, with reference to the opinion of the majority of the court in that case, that the opinion was largely influenced by the fact that several previous charters of said city did not grant the power to the city to regulate such houses, but only granted the power to suppress them. Judge

Dillon, in referring to the opinion of the majority of the court, remarks that "in view of the legislation recited in it, the opinion seems to be sound": 1 Dillon on Municipal Corporations, sec. 88, note 2. Now, while previous legislation — that is, previous charters — may in that case uphold the construction of the majority of the court, there is no room or basis for such argument or intendment in this case; but on the contrary, as we have heretofore stated, the same charter under which it is claimed the power to license houses of prostitution exists by implication, in express words grants the power to license numerous other trades and occupations, thus, it seems to us, excluding the conclusion that the power to license such houses was intended to be granted.

Smith v. Madison, 7 Ind. 86, and *Burlington v. Palmer*, 42 Iowa, 681, cited and relied upon by counsel for respondent, are, we concede, authorities supporting the proposition that the power to restrain and regulate includes the power to license. We cannot, however, concur in those decisions, nor admit the soundness of the reasons upon which they are grounded, especially in the case under consideration, where it so plainly appears, we think, that the legislature did not intend to grant the power which the city has assumed in enacting the ordinance in question.

It is further claimed by respondent that said ordinance is not in conflict with any general law of the state; that there is no valid general law of the state prohibiting houses of prostitution.

It is contended by counsel for respondent that the act of April 4, 1889 (Acts 21st Leg., pp. 33, 34), is void for uncertainty, because it prescribes different penalties for the same offense; that is, that for the offense of keeping a disorderly house, article 341 prescribes a fine of two hundred dollars for each day the house is kept, while for the same offense article 341 a prescribes a fine of not less than one dollar nor more than two hundred dollars for each day the house is kept.

As we understand and construe articles 341 and 341 a, they have reference to different and distinct matters and to different classes of offenders. Article 341 prescribes punishment for those who keep disorderly houses, while article 341 a punishes those who employ or have in service, in theaters, dance-houses, etc., prostitutes, etc. While the class of offenders named in article 341 a are keepers of disorderly houses as such houses are defined in article 349, and are to be deemed

guilty as such, as provided in article 341 a, still, the punishment prescribed for them is not the same as is prescribed for that other class of offenders who keep houses of prostitution or opium resorts. While the offense is, in legal contemplation, the same, the acts constituting it are different; and that different punishments are prescribed for different acts constituting the same offense in a different degree, or by different classes of persons, is not objectionable legislation.

Our conclusion is, that the ordinance in question is without authority of law; is repugnant to a valid general law of the state, and is void; and the judgment of the court below is reversed, and the appellant is discharged from custody, at the cost of respondent.

MUNICIPAL CORPORATIONS. — The power to license must be clearly conferred upon a city, before it can exercise such a right: Note to *Robinson v. Mayor of Franklin*, 34 Am. Dec. 638, 639.

SEARCY v. STATE.

[28 TEXAS APPEALS, 512.]

CRIMINAL LAW. — CONFESSION IS NOT ADMISSIBLE unless freely and voluntarily made by the prisoner, uninfluenced by persuasion or compulsion, not induced by any promise creating hope of benefit, or any threats creating fear of punishment, and after caution that it may be used against him. A promise by an officer to a prisoner that if he will confess, "he will do what he can for him in his case," renders the confession obtained thereby inadmissible.

CRIMINAL LAW — CONFESSION AS EVIDENCE. — Where the influence applied to obtain a confession is such as to make the prisoner believe his condition would be better by making it, whether true or false, it is inadmissible; if not, it is admissible.

Ford and Doremus, for the appellant.

W. L. Davidson, assistant attorney-general, for the state.

WHITE, P. J. But a single question is necessary to be determined on this appeal, and that is as to the admissibility of the defendant's confessions to the witness Dawson. Dawson was the sheriff of Brazos County, and as such arrested the defendant. Defendant made two confessions to Dawson; the first, just after his arrest, and when the sheriff was taking him to jail. Dawson then said to defendant: "There is no doubt but that you are one of the guilty parties, and if you will tell me all about it, so I can get all the guilty parties, I will do what I can for you in your case. It may be of

interest to you, and to me too." But he also told him that whatever he told him about it would be used as evidence against him. Defendant then confessed his guilt.

A second confession was made by defendant after he was in jail. He sent for Dawson, and told him that he wanted to tell him all about the case. Dawson informed the defendant that "whatever he said would be used in evidence against him (defendant), but if he would tell him all about it, so that he could get all the parties, he would do what he could for him in his case." Defendant then confessed his connection with the crime.

The first confession was excluded as evidence from the jury. The second was permitted to be introduced as evidence, over objections of defendant.

A confession, to be admissible at all, must be freely made, and without compulsion or persuasion; and if the party is in jail, it must be made voluntarily, after having first been cautioned that it may be used against him: Code Crim. Proc., arts. 749, 750. The confession is not admissible unless it was voluntarily and freely made, uninfluenced by persuasion or compulsion, not induced by any promise creating hope of benefit, or any threats creating fear of punishment.

Mr. Wharton says: "It has generally been held that any advice to a prisoner by a person in authority telling him it would be better for him to confess vitiates a confession induced by it. Lately, however, this has been greatly qualified, and it is now held that there must be a positive promise, made or sanctioned by a person in authority, to justify the exclusion of the confession": Wharton's Crim. Ev., 8th ed., sec. 651. He further says: "In conclusion, we may hold that a confession is only to be excluded on the ground of undue influence, where it is elicited by temporal inducement, e. g., by threat, promise, or hope of favor held out to the party in respect to his escape from the charge against him by a person in authority, under circumstances likely to lead to a false statement, or where there is reason to presume that such person appeared to the party to sanction such a threat or promise. If the influence applied was such as to make the defendant believe his condition would be better by making a confession, true or false, this excludes; but if not, the confession is admissible": Wharton's Crim. Ev., 8th ed., sec. 673; *Thompson v. State*, 19 Tex. App. 593; *Neeley v. State*, 27 Tex. App. 324; Willson's Crim. Stats., sec. 2472.

Here the sheriff told the defendant "if he would tell him all about it, so that he could get all the parties, he would do what he could for him in his case." This was not only a promise, but a persuasive and a positive one, by an officer high in authority, and one in every way calculated to make the defendant believe that his condition would be bettered by making the confession.

We are of opinion that the confession was inadmissible, and for error in its admission, the judgment is reversed, and the cause is remanded.

CONFESSIONS — EVIDENCE. — As to when confessions are admissible as tending to prove the guilt of an accused, see *Crowder v. State*, 28 Tex. App. 51; *ante*, p. 811, and note; *Musgrave v. State*, 28 Tex. App. 57; *Wampler v. State*, 28 Tex. App. 352.

CRUMES v. STATE.

[28 TEXAS APPEALS, 515.]

CRIMINAL LAW. — INDICTMENT FOR ASSAULT WITH INTENT TO ROB need not describe the property which the defendant intended to take, nor aver that he intended to deprive the owner of the property of the value of it.

WITNESS — OPINION EVIDENCE. — Witness may state his opinion as to the correspondence of tracks found at and near the place of an attempted robbery, and the shoes worn by defendant, or shoes worn by another, who, on the night of the offense, was seen in company with defendant.

WITNESS MAY STATE HIS OPINION that hair found on a fence was from a horse which the evidence shows that defendant was riding at the time of an attempted robbery.

EVIDENCE — DECLARATIONS AS HEARSAY. — Declarations made by the father of the accused when he delivered a pistol to an officer subsequent to an attempted robbery, about defendant not having had the pistol at the time of the attempt, is hearsay, and not part of the *res gestæ*. The father being a competent witness, he must be produced to testify to and establish the fact, if defendant desires such fact established.

CRIMINAL LAW — PRIVILEGE OF PROSECUTION. — The prosecuting attorney in a criminal case may comment upon the fact that the father of the accused, being present during the trial, was not placed upon the stand to testify in favor of the defendant.

INDICTMENT for assault with intent to rob. The only fact which appears from the record as necessary to an understanding of the points decided is, that an officer testified that he obtained the pistol exhibited in evidence at the house of the father of defendant about a week after the alleged offense.

J. M. Pierson and M. H. Garnett, for the appellant.

W. L. Davidson, assistant attorney-general, for the state.

WILLSON, J. In an indictment for an assault with intent to rob, it is not necessary to describe the property which the defendant intended to take, nor is it essential to aver that the defendant intended to deprive the owner of the property of the value of it. In this case the indictment alleges all the elements of the offense, and the exceptions thereto were properly overruled: *Morris v. State*, 13 Tex. App. 65.

It was not error to permit witnesses to state their opinions as to the correspondence of tracks found at and near the place of the attempted robbery, and the shoes worn by defendant, and also the shoes worn by one Coleman, who, on the same night of the offense, was seen in company with the defendant. Nor was it error to permit witnesses to state their opinions that the hair found on the fence was from a horse which the evidence showed defendant was riding on the night of the offense. As to the admissibility of such evidence, there is no longer any question: *Clark v. State*, 28 Tex. App. 189; *ante*, p. 817.

Defendant's third bill of exception shows no error. What James Crumes may have said when he delivered the pistol to the officer, as to defendant not having had said pistol on the night of the attempted robbery was hearsay, and not *res gestæ*. James Crumes was a competent witness, and if he knew that defendant did not have the pistol on the night in question, he should have been produced to testify to that fact, if defendant desired such fact to be established. Whether or not James Crumes willingly delivered the pistol to the officer was irrelevant to the issue in this case. In this connection, we will say that it was proper to permit the state to show that said James Crumes was in attendance upon the trial, and it was not improper for the district attorney, in his concluding argument, to comment upon the fact, and to argue that said James Crumes could have been placed upon the stand as a witness in behalf of defendant if the defendant had so desired.

Some exceptions were reserved by defendant to the charge of the court, and defendant requested special instructions, which were refused. We have given the charge of the court a careful examination, and in our opinion it is free from error. It presents fully and correctly the law of the case.

The evidence, we think, sustains the conviction, and there being no error shown in the record, the judgment is affirmed.

CRIMINAL EVIDENCE — OPINIONS. — A witness may express his opinion as to the correspondence between certain footprints and certain boots or shoes: *Clark v. State*, 28 Tex. App. 189; *ante*, p. 817; *Lipes v. State*, 15 Lea, 126; 54 Am. Rep. 402.

WEITZEL v. STATE.

[28 TEXAS APPEALS, 522.]

IDEM SONANS. — Where the name of an owner of stolen goods is written in an indictment as "Fraude," while the proper spelling of it is "Freude," and expert evidence shows a wide difference in sound in pronouncing the two words, the question of variance or no variance in the names should be submitted to the jury, with proper instructions explanatory of the rules of *idem sonans*.

IDEM SONANS. — When any question arises concerning the name of the person upon whom the indictment alleges that the injury was inflicted, the practice should be analogous to the practice in case of plea of misnomer by the prisoner. The fact should be submitted to the jury, and it is competent to show that the names are entirely dissimilar in sound, or that the prisoner is as well known by the name used in the indictment as by any other.

Crain, Kleberg, and Grimes, for the appellant.

W. L. Davidson, assistant attorney-general, for the state.

WHITE, P. J. The name of the owner of the stolen property, as it was written in the indictment, was "Fraude." He spelled his name and the proper way to spell it was "Freude." An expert German and English scholar testified that he would pronounce "Fraude" as "Frowdy," and "Freude" as "Froydy," and that when corrupted "Freude" was also pronounced "Friday." The learned trial judge held the two names "Fraude" and "Froydy" to be *idem sonans*, and refused to submit to the jury a special requested instruction asked in behalf of defendant, as follows, viz.: "If the jury believe from the evidence that the name of the party alleged to be the owner of the property alleged to have been stolen is different in sound from the name alleged in the indictment, to wit, William Fraude, they will acquit the defendant."

In the case of *Bell v. State*, 25 Tex. 575, our supreme court say: "Where any question arises concerning the name of the person upon whom the indictment alleges that the injury was inflicted, the practice should be analogous to the practice in the case of a plea of misnomer by the prisoner. The fact should be submitted to the jury, and it would be competent to show, in support of the allegation in the indictment, that the person was as well known by the name used in the indictment as by any other." In that case, the judgment was reversed because the judge erred in not leaving the jury to determine, as matter of fact from the evidence, whether the injury was or was not inflicted on the person named in the indictment. Under this

authority the court erred in refusing to give defendant's special requested instruction, and thus submit the question of variance or no variance in the names to the jury, in connection with appropriate instructions explanatory of the rules relating to *idem sonans*.

Because of this error, the judgment is reversed, and the cause remanded.

IDEM SONANS. — For the doctrine of *idem sonans*, see note to *Schooler v. Asher*, 13 Am. Dec. 233, 234; *Parchman v. State*, 2 Tex. App. 223; 23 Am. Rep. 435, and note 439. Compare *Mallock v. State*, 25 Tex. App. 654; 8 Am. St. Rep. 451, and note.

COLE v. STATE.

[28 TEXAS APPEALS, 536.]

PUBLIC HOUSE AS DEFINED BY STATUTE signifies a house commonly open to the public, either for business, pleasure, religious worship, the gratification of curiosity, or the like, and includes all houses made public by the occupation of them, as taverns, inns, storehouses for retailing liquors, or by the resort of numerous persons, or in any other way.

PUBLIC HOUSE. — **SCHOOL-HOUSE** is a public house within the meaning of a statute prohibiting card-playing in such house on Sunday, and the fact that it is not at times temporarily occupied as such, or that it may be so occupied for other than school purposes, does not, when vacant, or occupied for other purposes, make it any the less a public house during the time it is actually dedicated to school purposes as such. A house occupied during the week for school is none the less a public house on Sunday, whether occupied at all, or whether used on that day for religious services.

APPEAL. — **IN ABSENCE OF EXCEPTIONS TO CHARGES**, they will not be reviewed on appeal in a case of misdemeanor.

W. L. Davidson, assistant attorney-general, for the state.

WHITE, P. J. The charge as set forth in the indictment was, that defendant did, etc., "play at a game with cards at a certain public house, to wit, a certain school-house on Stepp's Creek, in said county and state, commonly open to the public for educational purposes, and business connected therewith, and where people did then and there resort for the purposes aforesaid, and for the purpose of business, recreation, and amusement, and said house being then and there a public place," etc.

The evidence fully established that the house where the playing took place was a school-house, built by the public, and used for educational purposes. But the playing was done

on a Sunday, and not on a day when the house was used by the public for educational purposes. It was objected by defendant that the state was allowed to prove that said school-house was also used for religious worship, and that religious services were held there on the day of the card-playing, the objection being that it was incompetent to give the house a public character by proving it was put to other uses than those alleged in the indictment.

The term "public house" as used in the statute (Pen. Code, art. 356) signifies a house commonly open to the public, either for business, pleasure, religious worship, the gratification of curiosity, and the like: *State v. Alvey*, 26 Tex. 155. The term "public house" is generic in its character, and is intended by law to include all houses made public by the occupation carried on in them, as inns, taverns, storehouses for retailing liquors, or those made public by the resort of numerous persons, or in any other way: *State v. Barnes*, 25 Tex. 654. A school-house is such a public house; and the fact that at times it is not temporarily occupied as such, or that may be occupied temporarily for other than school purposes, does not, when temporarily vacant, or when so occupied for other purposes, make it any the less a public house during the time it is actually dedicated to school purposes as such.

If the house was being occupied during the week for school purposes, it was none the less a public house on Sunday, whether occupied at all, or whether used on that day for religious services.

The evidence complained of in the bill of exceptions was immaterial, there being abundant testimony that at the time of the playing the house was a school-house, occupied, used, and resorted to as such.

There were no exceptions to the charge of the court, nor to the refusal of the defendant's special requested instructions; and the case being a misdemeanor, in the absence of exception, the charges will not be revised: *Loyd v. State*, 19 Tex. App. 821; *Comer v. State*, 26 Tex. App. 509.

The judgment is affirmed.

PUBLIC PLACE OR PUBLIC HOUSE. — As to the definition of a "public place" or "public house," see note to *Williams v. State*, 31 Am. Rep. 133, 139.

CASES
IN THE
SUPREME COURT OF APPEALS
OF
VIRGINIA.

**FIDELITY INSURANCE, TRUST, AND SAFE DEPOSIT
Co. v. SHENANDOAH VALLEY R. R. Co.**

[86 VIRGINIA, 1.]

CONSTITUTIONAL LAW. — THE REQUIREMENT OF THE CONSTITUTION THAT NO LAW SHALL EMBRACE MORE THAN ONE OBJECT, which shall be expressed in its title, is mandatory, and a statute which disregards it must be declared void.

CONSTITUTIONAL LAW — OBJECT NOT EXPRESSED IN TITLE OF STATUTE. — THE TITLE TO AN ACT MAY BE SO RESTRICTIVE as to exclude matters which might have been embraced in one enactment with the matters indicated in the title. In such case, the matter excluded by the restrictive words of the title cannot be inserted in the body of the statute without making it void.

CONSTITUTIONAL LAW. — IF THE OBJECT OF A STATUTE AS EXPRESSED IN ITS TITLE is to secure the wages of certain employees of railway and other corporations, and it contains a provision securing liens to persons furnishing iron, fuel, and other supplies, such provision is not within the object of the act as stated in the title, and is therefore inoperative.

CONTRACT, CONSTRUCTION OF. — IN DETERMINING THE REAL CHARACTER OF A CONTRACT, courts always look to its purposes rather than to the name given it by the parties; and though the parties denominate it a lease, the court may adjudge it a conditional sale with a reservation of the title for the purposes of security.

RAILROAD CORPORATIONS, AND MORTGAGE LIENS THEREON. — When there is a mortgage on a railway, and the corporation makes a conditional purchase of locomotives and cars, and the vendor reserves the title as security for the payment of the purchase price, he has a right, if the railway goes into the hands of a receiver, to the possession of such engines and cars, and compensation for their use, but the balance of the purchase price due him is not such a debt as in equity and good conscience ought to be accorded priority over the mortgage creditors.

PAYMENT. — DEBT IS NOT DISCHARGED BY ANY MERE CHANGE IN ITS FORM when it is secured by a mortgage, deed of trust, or vendor's lien, unless such was the intention of the parties. On the other hand, if any evidence of debt or security is accepted by the creditor in satisfaction of another debt, the latter is discharged.

NOVATION. — WHETHER A TRANSACTION AMOUNTS TO A NOVATION or not is a question of intention, to be decided from all the circumstances of the case, although nothing positive be expressed.

PAYMENT — DEBT, DISCHARGE OF. — The giving up of a security or an evidence of indebtedness, when accepting another, is a decisive circumstance in determining whether or not the security or evidence of indebtedness so accepted was received in payment or only as additional security.

PAYMENT. — DEBT WILL BE DEEMED EXTINGUISHED AND PAID when it consists of coupons and other evidences of debt which are delivered up and canceled, and income bonds received therefor at sixty cents on the dollar, secured on the property of the debtor, and also guaranteed, to a certain extent, by a third and solvent debtor.

ESTOPPEL. — If the holder of certain indebtedness against a railway corporation is also one of its officers, and he makes and publishes a statement of its financial condition, upon the strength of which sales of its bonds are effected to innocent purchasers, he will not be allowed to impair their security by subsequently showing that his statements were not true, and that he held claims against the corporation which are entitled to precedence over such bonds, and which were not disclosed in such financial statement.

SUBROGATION IS AN EQUITABLE REMEDY, allowed only when it does not conflict with the legal or equitable rights of other creditors of the common debtor. If moneys are loaned to a railway corporation in the ordinary course of business, and without any agreement as to the use to be made of them, and they are afterwards paid out to laborers and supply-men, after which the corporation goes into the hands of a receiver, the persons making such loans are not entitled to be subrogated to the claims paid with the moneys loaned, as against mortgagees of the corporation.

A RECEIVER was appointed in this cause for the defendant corporation, and by a decree entered therein it was determined that the bondholders, under a general mortgage, should share in the security of the first mortgage to the extent of one million five hundred and sixty thousand dollars, that being the amount of first-mortgage bonds deposited with a trustee as collateral security for general mortgage bonds. On December 24, 1887, a foreclosure was decreed. Various bondholders had become parties by petition during the pendency of the suit. The decree complained of in the present appeal was one determining that certain "car-trust creditors" held a lien on the property of the corporation for cars and engines furnished, and that their lien was superior to that of the holders of the bonds secured by mortgage. There was also an appeal by Clark and Kimball, bankers, because the decree rejected their claim to priority over the other creditors.

William J. Robertson, John C. Bullitt, Charles L. Lamberton, Joseph Leedom, W. W. and B. T. Crump, J. S. Clark, and W. R. Staples, for the appellants.

Johnston, Williams, and Boulware, Camm Patteson, Waller R. Staples, H. Gordon McCouch, R. C. Dame, and W. H. Travers, for the appellees.

LEWIS, P. We are of opinion that so much of the decree of the April term, 1888, is erroneous as decided that the claims designated in the record as the "car-trust claims" constitute a lien on the franchises and all the property, real and personal, of the defendant company. These claims are for engines and other rolling stock which were furnished by the Railroad Equipment Company, E. E. Denniston, and other persons to the defendant company at different times prior to the commencement of the present suit, and for which the company undertook to pay in monthly installments; the title, however, to be retained until the equipment should be fully paid for. As appears from the master's report, the aggregate amount of these claims exceeds the sum of seven hundred thousand dollars,—a sum equal to, or perhaps in excess of, the real value of the equipment,—and they are reported by him and adjudged by the court to be liens on the property of the company prior to the mortgages in question.

This conclusion is based on certain provisions of the statute approved March 21, 1877, as amended by an act approved April 2, 1879 (Acts 1876-77, p. 188; Acts 1878-79, p. 352), and its correctness therefore depends upon the validity of those provisions.

The title of the first-mentioned act is, "An act to secure the payment of wages or salaries to certain employees of railway, steamboat, and other corporations"; and the first section of the act enacts "that hereafter all conductors, brakemen, engine-drivers, firemen, captains, stewards, pilots, clerks, depot or office agents, store-keepers, mechanics, or laborers, and all persons furnishing railroad iron, fuel, and all other supplies necessary for the operation of trains and engines employed in the service of any railroad, canal, or other transportation company chartered under or by the laws of this state, or doing business within its limits, shall have a prior lien on the franchise, the gross earnings, and on all the real and personal property of said company which is used in operating the same for and to the extent of the wages or salaries contracted to be

paid them by said company; and no mortgage, deed of trust, sale, conveyance, or hypothecation hereafter executed of said property shall defeat or take precedence over said lien."

The second section then goes on to provide how the lien secured by the first section shall, in order to avail, be verified and recorded, and the third section provides the rights of an assignee of the lien.

The title of the amendatory act is as follows: "An act to amend and re-enact the first and second sections of an act approved March 21, 1877, entitled an act to secure the payment of the wages or salaries of certain employees of railway, canal, steamboat, and other transportation companies"; and the only amendment made by the act which is material to the present case is, that it adds the words "engines" and "cars" to the list of supplies mentioned in the first section of the original act, and for which a lien is given.

The question upon which this branch of the case depends is, whether this legislation, so far as it relates to what is known as supply creditors, is germane to the title of the statute, or whether it is not sufficiently indicated by the title, and therefore invalid by virtue of the constitutional requirement that "no law shall embrace more than one object, which shall be expressed in its title": Const., art. 5, sec. 15.

The question is a grave one, and we fully appreciate its importance and delicacy. Every act of the legislature is presumed to be constitutional, and ought to be sustained by the courts, unless the conflict between the statute and the constitution be palpable; and especially is this so in a case like the present, as it is often difficult to determine the degree of particularity which must be observed in the title of a statute, in order to make the title and the body of the act conform to the constitutional requirement; but where the repugnancy between the statute and the constitution is too clear to admit of reasonable doubt, the constitution must prevail, and the statute, to the extent of the repugnancy, must be declared invalid, be the consequences what they may.

As to the constitutional provision in question, it is, as we have had occasion in a recent case to declare, not only mandatory, but of great public utility. It was introduced into the constitution for a wise purpose, and ought to be reasonably interpreted and firmly enforced. One of its objects is to prevent corrupt or surreptitious legislation by incorporating into a bill obnoxious provisions of which the title gives no indica-

tion, and its requirement is, that the title, while it need not be a complete index of the act, must indicate its object with sufficient distinctness to enable the members of the legislature to fairly understand it by simply hearing the title read. In other words, the title is not to be used as a deceptive cover for vicious or surreptitious legislation.

When the title is general, as it may be, all persons interested are put upon inquiry as to anything in the body of the act which is germane to the subject expressed; but when the title is restrictive, and confined to a special feature of a particular subject, the natural inference is, that other features of the same general subject are excluded.

"As the legislature," says Judge Cooley, "may make the title to an act as restrictive as they please, it is obvious that they may sometimes so frame it as to preclude many matters being included in the act which might with entire propriety have been embraced in one enactment with the matters indicated by the title, but which must now be excluded because the title has been made unnecessarily restrictive." Nor can the courts, he adds, "enlarge the scope of the title; they are vested with no dispensing power; the constitution has made the title the conclusive index to the legislative intent as to what shall have operation. It is no answer to say that the title might have been made more comprehensive, if in fact the legislature have not seen fit to make it so": Cooley's Constitutional Limitations, 149.

In a recent case in the supreme court of Pennsylvania it is said: "The purpose of the constitutional provision is to prevent a number of different and unconnected subjects from being gathered into one act, and thus to prevent unwise or injurious legislation by a combination of interests. Another purpose was to give information to the members, or others interested, by the title of the bill, of the contemplated legislation, and thereby to prevent the passage of unknown and alien subjects, which might be coiled up in the folds of the bill. The provision was found necessary to correct the evils of unwise, improvident, and corrupt legislation, and therefore is to receive an interpretation that will effectuate its true purpose. It would not do to require the title to be a complete index to the contents of the bill, for this would make legislation too difficult, and bring it into constant danger of being declared void; but, on the other hand, the title should be so certain as not to mislead."

"We are not called upon," the court further said, "to show the necessity or vindicate the wisdom of the constitutional requirement. It is enough for us to know that it is an express mandate of the original law which the legislature ought to obey and the courts are bound to enforce. While it may be difficult to formulate a rule by which to determine the extent to which the title of a bill must specialize its object, it may be safely assumed that the title must not only embrace the subject of proposed legislation, but also express the same so clearly and fully as to give notice of the legislative purpose to those who may be specially interested therein. Unless it does this, it is useless": *In re Road of Phoenixville*, 109 Pa. St. 44.

The constitution of Michigan contains, as do the constitutions of many other states in the Union, a provision identical with that of our own constitution above quoted, and in the case of *People v. Mahaney*, 13 Mich. 481, the supreme court of that state, after referring to the practice which had theretofore prevailed of including in one act subjects of diverse natures, and saying that it was corruptive both to the legislature and the state, used this language: "It was scarcely more so, however, than another practice, also intended to be remedied by the constitutional provision, by which, through dexterous management, claims were inserted in bills of which the titles give no intimation, and their passage secured through legislative bodies whose members were not generally aware of their intention and effect. . . . The framers of the constitution meant to put an end to legislation of this vicious character, which was little less than a fraud upon the public, and to require that in every case the proposed measure should stand upon its own merits, and that the legislature should be fairly notified of its design when required to pass upon it." See also *Supervisors v. McGruder*, 84 Va. 828; *Lane v. State*, 49 N. J. L. 673; *City of Kansas v. Payne*, 71 Mo. 159; *Cullip v. Sheriff*, 3 W. Va. 588; *Hingle v. State*, 24 Ind. 28; *Ryerson v. Utley*, 16 Mich. 269; *Failing v. Commissioners*, 53 Barb. 70; *Prothro v. Orr*, 12 Ga. 36; *Montclair v. Ramsdell*, 107 U. S. 147; *Carter County v. Sinton*, 120 U. S. 517; *Ex parte Thomason*, 16 Neb. 238.

In the light of the principles, there can be no reasonable doubt, we think, that so much of the act, and the act amendatory thereof, as is relied on in the present case, is repugnant to the constitution, and therefore void. The simple and single purpose indicated by the titles to the two acts is to secure the

payment of wages or salaries to certain employees; and we have only to regard the plain and well-understood meaning of those terms to see that by no possibility can they be made to embrace the claims in question. The price of a locomotive is not wages or salary, and a person who builds and sells locomotives, cars, etc., is presumably not an employee, but an employer. Bouvier defines wages to be "a compensation given to a hired person for his or her services"; and salary he defines as "a reward or recompense for services performed; . . . the price of hiring of domestic servants and workmen"; though the term is usually applied, he says, to the rewards paid to a public officer for the performance of his official duties.

We do not see how argument can make plainer the invalidity of the act in the particular mentioned. The title is misleading and deceptive. It gave not the remotest intimation of the provisions of the act relied on here, which are foreign to the subject expressed in the title; and to sustain the act in its entirety would be, in effect, by judicial construction, to eliminate from the constitution one of its most important provisions, or at all events, to seriously impair its usefulness. This the courts have no power to do. Our duty in such a case is to maintain the constitution inviolate, and to declare void so much of the act as is inconsistent therewith. And a decree in the present case will be entered accordingly.

It is insisted, however, that whether the statute be valid or not, the claims in question are privileged debts, entitling the claimants to superior equities to the mortgage creditors, according to the doctrine of *Fosdick v. Schall*, 99 U. S. 235, *Williamson v. Washington City etc. R. R. Co.*, 38 Gratt. 624, and other cases of that class.

In those cases (the principle now well established in the jurisprudence of the country) was announced that when the current receipts of a railroad, which are always first applicable to the payment of its current debts, i. e., debts for labor, supplies, and the like, are used in paying the mortgage debt, or in strengthening or protecting the security, it is competent and proper for a court of equity, when asked by the mortgagees to take possession of the road, and to hold and operate it for their benefit by the appointment of a receiver, to direct that the fund thus diverted be restored from the income of the receivership, or, under some circumstances, even from the proceeds of the sale of the *corpus* of the other property: *Union*

Trust Co. v. Souther, 107 U. S. 591; *Burnham v. Bowen*, 111 U. S. 776; *St. Louis etc. R. R. Co. v. Cleveland etc. R'y Co.*, 125 U. S. 658, 678; *Hale v. Frost*, 99 U. S. 389.

But the present case is not within this principle. Indeed, the case of *Fordick v. Schall*, 99 U. S. 235, so far from supporting, is an authority against the position of the claimants. There certain cars had been sold by the appellee to the railroad company before the appointment of a receiver, to be paid for in installments, and the title was retained until all the payments should be made. Default was made in the payments, and under orders in the cause, the receiver paid for the use of the cars during the receivership, but the vendor insisted that he was entitled, in addition to this, to take back the cars and also to be paid the balance due him out of any funds in court to the credit of the cause not otherwise appropriated. The supreme court held he could reclaim the cars, and that he was entitled to be paid for their use by the receiver, but that for any balance that might be due him after his own reserved security had been exhausted, he occupied the position of a general creditor only. And the present case stands upon the same footing.

Here there was, in legal effect, a conditional sale of the equipment in question, with a retention of title as a security for the purchase-money. The written contracts between the parties, it is true, purport to be leases, but the mere language used is by no means conclusive of the legal nature of the transactions. As was said in *Hervey v. R. I. Locomotive Works*, 98 U. S. 664 (which also was a case of a rolling-stock contract), "the transaction is not changed by giving it the form of a lease. In determining the real character of a contract courts will always look to its purpose, rather than to the name given it by the parties."

The claimants, moreover, have been paid by the receiver, with the sanction of the court, for the use of the equipment by him, and this was proper, as it is the duty of a court to pay from the trust fund in its possession all the debts it incurs in administering the trust: *Myer v. Western Car Co.*, 102 U. S. 1. They are also entitled to enforce what is, in effect, a lien retained by them upon the equipment for whatever may now be due them; that is to say, they are entitled to reclaim it; nor is this disputed. But as for any balance that may remain after enforcing that lien, they are, as the supreme court

said in *Fosdick v. Schall*, 99 U. S. 235, general creditors only, with no special equities in their favor.

To the same effect is *Huidekoper v. Hinckley Locomotive Works*, 99 U. S. 258, which was the case of a conditional sale of locomotives, and in which the same principle was applied. In *Burnham v. Powen*, 111 U. S. 776, a claim for coal furnished the railroad company, to be used on its engines, before the appointment of a receiver, was allowed on the ground that the income of the receivership had been used to pay off encumbrances on the mortgaged property, thereby increasing the security of the bondholders at the expense of the labor and supply creditors. It was held that this was such a diversion of what was denominated the "current debt fund" as to make it proper to require the mortgagees to pay it back. The court, however, added, by way of caution, as in *Union Trust Co. v. Morrison*, 125 U. S. 591, it afterwards repeated: "We do not now hold, any more than we did in *Fosdick v. Schall*, 99 U. S. 235, or *Huidekoper v. Hinckley Locomotive Works*, 99 U. S. 258, that the income of a railroad in the hands of a receiver, for the benefit of mortgage creditors who have a lien upon it under their mortgage, can be taken away from them and used to pay the general creditors of the road. All we then decided, and all we now decide, is, that if current earnings are used for the benefit of mortgage creditors before current expenses are paid, the mortgage security is chargeable in equity with the restoration of the fund which has been thus improperly applied to their use."

The same principle was recognized in *Addison v. Lewis*, 75 Va. 701, in which case, after referring to *Fosdick v. Schall*, 99 U. S. 235, and similar cases, Judge Christian, in whose opinion all the judges present concurred, said: "It has been said, and said truly, that these decisions constitute 'a new departure,' and I am not disposed to extend the doctrine one inch beyond the point to which the authority of these cases plainly points."

Many other cases were referred to in the argument, which we have examined, but it is unnecessary to comment upon them. The truth is, no invariable rule is deducible from the authorities. Each case must therefore be decided in the light of its own circumstances; and so viewing the present case, we think the claims in question are not such debts as ought, in equity and good conscience, to be accorded priority over the mortgage creditors. It was not alleged in the petitions of in-

tervention filed by the claimants in the court below, nor is it proven, that any portion of the current income of the company before the appointment of the receiver was diverted to the benefit of the bondholders; and where there has been "no diversion, there can be no restoration."

This, then, disposes of the car-trust claims.

We come next to consider the case of Messrs. Clark and Kimball, bankers of Philadelphia, who have also appealed from so much of the decree as postpones to the first and second mortgages their claim to priority over those mortgages to the extent of the promissory notes of the Shenandoah Valley Railroad Company used by them in purchasing income mortgage bonds of the company, and now held by them. On the other hand, the appellees complain of the decree, under the ninth rule of the court, on the ground that the decree goes too far in favor of the said appellants in giving them the benefit of the liens of the coupons which were used by them in purchasing income bonds, and who insist that this alleged error should be corrected. The ground of this contention is, that the coupons, when surrendered to the company, were paid for and discharged with income bonds, and consequently the liens to secure them were to that extent extinguished also.

A brief reference to the facts is essential to a correct understanding of the questions thus raised.

The appellants Clark and Kimball were for a long while the bankers of the railroad company, and appear to have rendered it valuable pecuniary aid. Their unpaid loans to the company at one time amounted to nearly half a million dollars, which were evidenced by the promissory notes of the company. Much of the money thus loaned, it is claimed, went to pay off labor and supply claims and other privileged debts of the company. They also held a large amount of the first and general mortgage coupons of the company, maturing in 1883 and 1884. These, with the notes above mentioned, were used at par in purchasing income bonds at sixty cents on the dollar, which bonds are secured by what is called the income or third mortgage on the road.

The appellant's claim is founded upon two propositions, namely: 1. That as to the coupons, there was a mere exchange of securities, without affecting the debt of which the coupons were the evidence; and 2. That as to the promissory notes, the money for which they were given was used in the payment of preferred debts, and therefore that the appellants

are entitled to be subrogated to the rights and privileges of the creditors whose debts were thus paid.

There is certainly no better settled principle in equity, nor one, perhaps, which has oftener been recognized and acted upon by this court, than that no mere change in the form of the evidence of a debt secured by mortgage, deed of trust, or a vendor's lien will operate to discharge the debt, unless so intended by the parties. The cases of *Yancey v. Mauck*, 15 Gratt. 200, *Gilbert v. Washington City etc. R. R. Co.*, 33 Gratt. 586, and *Stimpeon v. Bishop*, 82 Va. 190, may be mentioned among the many cases in this court on that subject. At the same time, it is equally well settled that where one security is accepted by the creditor in satisfaction of another, the debt evidenced by the latter is discharged. In a case, therefore, of a change of securities, the question always is, What was the intention of the parties? or as it is usually expressed, the question whether the transaction amounts to a novation is a question of intention, to be derived from all the circumstances of the case, although nothing positive be expressed. And in the absence of proof of a special agreement, the giving up or the retention of the original security will, in general, be a decisive circumstance in determining that question; for if the creditor means, in any contingency, to resort to the original indebtedness, he will scarcely be willing to surrender all evidence of that indebtedness to his debtor without fortifying himself with some acknowledgment of the real nature of the transaction. This was decided in *Morris v. Harveys*, 75 Va. 726, and such is the well-settled doctrine.

In the present case, there was no express agreement when the coupons in question were surrendered, and hence we must look to the surrounding circumstances to ascertain what the intention of the parties was.

It appears from the record that income bonds to the amount of one million five hundred thousand dollars were issued and sold by the railroad company, which were principally paid for with the coupons and notes above mentioned. These bonds were secured, as already stated, by what is called the income or third mortgage, which mortgage was executed in accordance with a previous written agreement between the Shenandoah Valley Railroad Company and the Norfolk and Western Railroad Company, bearing date December 29, 1882.

That agreement shows that by a previous contract between the same parties, dated September 27, 1881, the Shenandoah

Valley company had agreed to complete its road, the southern terminus of which was then at Waynesboro, to a junction with the Norfolk and Western road, which, up to the 29th of December, 1882, it had failed to do. Accordingly, it was agreed that in order "to pay and provide for its floating and accruing indebtedness," and to raise the means to complete its road, the Shenandoah Valley company would issue income bonds, and secure them by an additional mortgage. And "for the purpose of adding to the value of said income bonds, and more promptly and advantageously negotiating the same," the Norfolk and Western company agreed to guarantee, on certain specified conditions, the payment of interest on the bonds, which, it was agreed, should not be sold at less than sixty per cent of their par value, payable in cash or obligations of the first-mentioned company, including mortgage coupons maturing in 1883 and 1884.

The mortgage was accordingly executed on the 12th of February, 1883, and it set forth the object of the issue of the bonds secured by it, the terms and conditions upon which they were issued, and also the substance of the agreement aforesaid, as did the bonds themselves.

The appellants Clark and Kimball thus had, independently of their official connection with the company, full notice of the objects for which the bonds purchased and now held by them were issued; and it is not reasonable to suppose that in surrendering their coupons at par, and getting for them at sixty cents on the dollar income bonds secured and guaranteed as already indicated, they were merely exchanging one form of indebtedness for another, leaving the original indebtedness evidenced by the coupons unaffected. On the contrary, the circumstances of the transaction preclude any such conclusion. Here not only was the original security given up, but a new one was taken, secured not only on the property of the debtor, but guaranteed, to a certain extent, by a third and solvent party, and the new security reciting, what was known before, that it was issued to pay the floating and accruing indebtedness of the company; a large portion of which indebtedness was used at par in purchasing the bonds at only a little over one half of their nominal value.

In addition to this, the coupons, when turned into the company, were canceled, and the transaction was treated, as in effect it was, an extinguishment of the coupons. And that

such was the intention of the parties at the time hardly admits of doubt.

Besides, if this be not the true view of the matter, the appellants must, upon the plainest principles of equity, be held to have waived the claim now asserted by them. In a printed statement to the New York Stock Exchange dated May 31, 1883, accompanying their application to have the mortgage bonds of the company, including the income bonds, "listed," as it is called, statements were made by the officers of the company as to the financial condition of the company which are utterly at war with the claims now asserted; that is to say, according to that statement, no such claims as those now asserted were outstanding or chargeable against the company; and if they are good now, they were good then, and ought to have been embraced in the statement. At that time Kimball, one of the appellants, was the president of the company, and Clark, the other appellant, was one of its directors. Upon the strength of these representations, sales of the bonds were no doubt effected to innocent purchasers, and it would now be the grossest injustice to such persons to allow the claims in question as a preferred charge on the mortgaged property, and thereby, to that extent, to impair the security of the mortgages. Plainly, upon no just principle can this be done.

A decisive authority upon this point is *Addison v. Lewis*, 75 Va. 701. There the president of the railroad company intervened, and asserted a claim for several years' salary, which accrued before the road went into the hands of a receiver, but as it appeared that in his published annual reports, as president for the years in question, his salary for those years was put among the paid items, it was held that any right which he might have had to be paid in preference to the bondholders had been waived, although the salary, in point of fact, had not been paid. This ruling, it seems to us, is eminently just and proper, and in accordance with public policy, inasmuch as the officers of a railroad company are, in a general sense, trustees, and must therefore act in the strictest good faith in putting forth statements to the public as to the condition of the affairs of the company, upon which innocent third persons, in their dealings with the company, have a right to rely.

The same considerations apply to the promissory notes in question, and as to which the appellants claim the right of subrogation. But enough has been already said to show that this is not a proper case for the application of that doctrine.

"The law of subrogation is the exercise of the equitable powers of the court, to afford a summary relief to a meritorious creditor, who might otherwise be subject to loss by the operation of proceedings at law against the estate or funds of one who is indebted both to him and to others. This equitable remedy is allowed only when it does not conflict with the legal or equitable rights of other creditors of the common debtor. . . . It is the creature of equity, and justice is its object. It is founded, not upon contract, express or implied, but upon principles of equity and benevolence, and is only to be administered in a clear case, and never to the prejudice of the rights of others. . . . Being purely a creature of equity, it is enforced in those cases where its application is just, and sanctioned by the obligations of good faith and sound policy" Sheldon on Subrogation, sec. 4; *Enders v. Brune*, 4 Rand. 438; *Clevinger v. Miller*, 27 Gratt. 740; *Miller v. Holland*, 84 Va. 652; 3 Pomeroy's Eq. Jur., sec. 1419, note 1.

Besides, there is no proof that when the money was loaned for which the notes were given there was any understanding as to how it should be applied. The company at the time was financially embarrassed, and the loans were simply made in the ordinary course of business. The lenders were pecuniarily interested in the road, and no doubt were influenced thereby in loaning the money, but with no agreement that any particular claims, or class of claims, should be paid with it. Indeed, Kimball himself, one of the appellants, testifies explicitly in his deposition that the money was advanced without any special agreement, written or verbal; so that it went into the treasury of the company unaffected by any special equities of the appellants; and when, afterwards, a part of it was paid out to laborers and supply-men, the debts so paid were forever discharged.

It appears, moreover, that when the notes for the loans were taken, the appellants received general mortgage bonds of the company as collateral security for their payment, which goes far to show, if it does not conclusively show, that the idea of a right to subrogation is altogether an afterthought; for why take general or second-mortgage bonds as collateral if the understanding was that the appellants were to stand in the place of those whose equities were superior even to the first mortgage? To this question the answer must be, that the money was loaned on the credit of the company and the collaterals so furnished, alone. At all events, such is the

fair inference from the record, and there is no evidence to repel it.

In *Addison v. Lewis*, 75 Va. 701, a similar claim was asserted on the part of a bank for money advanced by it before the appointment of a receiver, and which was used by the railroad company in paying current expenses. The claim, however, was rejected. The court said: "The bank discounted the paper of the company solely upon the credit of the company, and upon collaterals deposited by the company with the bank. The acceptance of these collaterals was in itself a recognition of the subordination of the claim of the bank to the lien of the bondholders, and is sufficient to estop the bank from setting up the claim preferred in the petition."

The cases of *Cos v. New Jersey Midland R'y Co.*, 31 N. J. Eq. 105, and *Atkins v. Petersburg R. R. Co.*, 3 Hughes, 307, relied on by the appellants, are not in point, as in each of those cases the advances were made at the instance of the debtor, on a distinct understanding, clearly established, that the parties by whom they were made should be subrogated to the rights of the creditors whose debts were paid with the money advanced. See 3 Pomeroy's Eq. Jur., sec. 1212; and cases in the notes.

In short, we are of opinion that the claim of the appellants Messrs. Clark and Kimball to superior equities to the bondholders cannot be sustained; that they are entitled, as to the income bonds held by them, to the security of the income mortgage only; and that so much of the decree of the circuit court as is in conflict with this opinion must be reversed and annulled.

Decree reversed in part and affirmed in part.

STATUTES, WHAT MUST BE EXPRESSED IN THE TITLE. — An act should embody but one subject, and its title should clearly state the subject of the legislation: Note to *Allen v. Pioneer Press Co.*, 12 Am. St. Rep. 716; *In re Hauck*, 70 Mich. 397; *Bank v. Indianapolis*, 120 Ind. 477; *Perry v. Ober*, 25 Neb. 826; *Hargrave v. Weber*, 66 Mich. 52; *Nixon v. Peer Directors*, 128 Pa. St. 446; *Hartford Ins. Co. v. Raymond*, 70 Mich. 485; *People v. Phipps*, 70 Mich. 6; *Isle Royale etc. Corporation v. Osmun*, 76 Mich. 163; *State v. Brown*, 41 La. Ann. 772. But the subject need only be expressed in the title to the act in general terms: *People v. Blue Mountain Joe*, 129 Ill. 371; *Donnerberger v. Prendergast*, 123 Ill. 223. In the case of *In re Senate File*, 25 Neb. 365, it was decided that a title stating the object of a bill to amend the constitution is unnecessary, such a title being necessary only in cases of ordinary legislation. In construing acts by the rule requiring their object to be stated in the title, the courts should neither be too strict to require every matter of detail to be stated, nor so liberal as to render the provision of no effect: *In*

re *Hatch*, 70 Mich. 287. But provisions in an act which are clearly not within the title are void: *Tosmalin v. Omaha*, 25 Neb. 816; *State v. Murray*, 41 Minn. 123; *Eaton v. Walker*, 76 Mich. 579; *Brooks v. Hydron*, 76 Mich. 273. But the mere fact that an act is broader than the subject of its title does not render it void; yet the legislature may make the title as restrictive as it may see fit, and the courts cannot enlarge its scope: *Skate v. Palmer*, 23 Fla. 621. If all the provisions of the act relate to the same subject, or are naturally connected therewith, and are not foreign to the subject expressed in the title, the act is valid: *Burnside v. County Court*, 86 Ky. 423; *Gayle v. Owen County*, 83 Ky. 61; *Richman v. Supervisors*, 77 Iowa, 513; 14 Am. St. Rep. 308.

CONTRACT, WHETHER SALE OR LEASE: See *Latham v. Sumner*, 89 Ill. 233; 31 Am. Rep. 79, and note 81, 82.

CONDITIONAL SALE, EFFECT OF, UPON THE RIGHTS OF THE PARTIES THEREIN, and those claiming under the vendee, when the title has been reserved in the vendor until payment in full of the purchase price: Note to *Sumner v. Woods*, 42 Am. Rep. 105-107; *Chickering v. Bassett*, 130 Ill. 206; 17 Am. St. Rep. 308, and note 312, 313.

BOWDEN v. PARRISH.

[86 VIRGINIA, 67.]

CONVEYANCE. — ACKNOWLEDGMENT OF A DEED CANNOT BE TAKEN BY A GRANTEE THEREIN, though the conveyance is to him as trustee.

ACCEPTANCE OF A DEED BY A GRANTEE OR TRUSTEE IS PRESUMED from its delivery, unless he repudiates it. This presumption is not rebutted by the fact that he, acting as a notary public, took and certified the acknowledgment of the deed.

INTEREST OF AN HEIR IN THE REAL ESTATE OF HIS ANCESTOR SHOULD NOT BE DEEMED TO BE SOLD before directing a settlement of the administrator's accounts.

J. N. Stubbs and George P. Haw, for the appellant.

Thomas P. Bagby, for the appellees.

LEWIS, P. This was a suit in the circuit court of King and Queen County to subject the real estate of the defendant B. F. Bowden to the satisfaction of the liens thereon. The suit was brought by the appellee William M. Parrish, who is a judgment creditor of the said B. F. Bowden and M. L. Bowden, his wife. The plaintiff's judgment was recovered in April, 1884, and the first question to be determined is, whether or not the lien of the judgment is paramount to a certain deed of trust executed by the said Bowden and wife to R. B. Roy, trustee, in January, 1873, and which, as appears from the record, purports to have been admitted to record in the clerk's

office of King and Queen County court on the 13th of March, 1873, upon a certificate of acknowledgment signed by the said Roy, a notary public.

The bill charges that the deed was improperly admitted to record, and that its pretended recordation is a nullity, because founded upon a void acknowledgment, the said Roy being trustee in the deed, and therefore incompetent to take the acknowledgment. And this position, we think, is well taken.

In *Davis v. Beazley*, 75 Va. 491, it was decided that a grantee in a deed, or a beneficiary under it, is not allowed as an officer to take an acknowledgment of the deed by the grantor with a view to its registration, and that the certificate of such acknowledgment is invalid as authority to admit the deed to record, and hence a recordation based upon it is without effect as notice by construction under the registry laws. And the conclusive reason assigned was, that the act of an officer in taking an acknowledgment of a deed is judicial in its character, and cannot therefore be performed by one who is interested in it, since no man can be a judge in his own cause. In that case the grantor in the deed took his own acknowledgment to it, and, as clerk, admitted it to record, and this was held to be invalid.

The same principle is applicable to the present case. The trustee was an interested party, and therefore disqualified to take the acknowledgment of the grantors, as much so as if he had been the sole beneficiary in the deed. Any interest in the proceeding whatever, no matter how slight or remote, will disqualify a man from acting as "a judge in his own cause," and here the trustee was interested, at least to the extent of his commissions. And so in similar cases it has been determined in other states: *Brown v. Moore*, 38 Tex. 645; *Stevens v. Hampton*, 46 Mo. 404; note to *Withers v. Baird*, 82 Am. Dec. 757; 1 Am. & Eng. Ency. of Law, 145, and cases cited.

Indeed, the general principle is conceded by counsel for the appellant, but he insists that it ought not to be applied in this case, because, he says, there is no evidence of acceptance on the part of the trustee. But this position is untenable, as the acceptance of a grantee in a deed for his benefit is always implied in the delivery of the deed, and the law presumes that every estate is beneficial to the party to whom it is devised or conveyed, until he renounces it: *Skipwith v. Cunningham*, 8 Leigh, 271; 31 Am. Dec. 642; 2 Minor's Institutes, 656. And

here no dissent, on the part of the trustee, was expressed, and none can be implied merely from his act of taking the grantor's acknowledgment to the deed.

It is contended, however, that there is no proof that the officer by whom the acknowledgment was certified is the same person who is named as the trustee in the deed. But the answer to this is, that the commissioner to whom the cause was referred reports that he was, and there is no proof to the contrary; nor was it the duty of the commissioner to return the evidence upon which his report was based, in the absence of any direction so to do; and none was given in the present case. The report, therefore, upon this point is conclusive: *Bowers v. Bowers*, 29 Gratt. 697; *Robinson v. Allen*, 85 Va. 781.

Another objection made by the appellant is, that the commissioner did not report as to whether the deed of trust is a lien on the defendant's real estate, "or make any report about it." The commissioner did report the facts concerning it; and although he did not report in so many words that the deed, in his opinion, had not been legally recorded, and therefore that there was nothing upon which to predicate constructive notice of it to the plaintiff, yet he did impliedly so report; and the effect of the decree overruling the exceptions to the report, and directing the land to be sold, was to determine that the alleged registry of the deed was a nullity. This was a legal conclusion from the facts reported by the commissioner, and hence the appellant has not been prejudiced by the failure of commissioner to report more specifically and in detail upon the point. Enough appeared to enable the court to pass upon it, and that is all that was necessary.

We are of opinion, however, that there was error in decreeing a sale of the interest of the defendant B. F. Bowden in the real assets of the estate of his father, Robert Bowden, deceased, before directing a settlement of the administrator's accounts. There are several heirs, and the failure to direct such an account was contrary to the established rule in such cases, recognized in *Hoge v. Junkin*, 79 Va. 220, and is error, for which the decree must be reversed. And as the case must go back to the circuit court for further proceedings, it is unnecessary to pass upon any other question discussed at the bar.

Decree reversed.

DEED, ACKNOWLEDGMENT OF.—The grantee in a deed, although he takes merely as a trustee, cannot take the grantor's acknowledgment thereto: *Note to Withers v. Baird*, 22 Am. Dec. 757.

DEEDS, ACCEPTANCE OF, BY GRANTEE.—The rule that grantees are presumed to have accepted deeds made in their favor applies to trust deeds: *Stone v. King*, 7 R. L. 358; 84 Am. Dec. 557.

RICHMOND AND DANVILLE R. R. CO. v. WILLIAMS.

[86 VIRGINIA, 162.]

MASTER AND SERVANT.—IT IS THE DUTY OF THE MASTER TO EXERCISE ALL REASONABLE CARE to provide and maintain safe, sound, and suitable machinery and other instrumentalities, and not to expose his employees to risks beyond those which are incidental to the employment and in contemplation at the time of the contract of service; and an employee has the right to presume that these duties have been performed.

MASTER AND SERVANT.—IF A BRAKEMAN IN THE SERVICE OF A RAILROAD CORPORATION IS INJURED BY A LADDER being broken, and by the conductor starting the train in motion under such circumstances as to imperil the life of the brakeman and to injure his person, he is entitled to recover of the corporation compensation for the injury suffered; if the dangerous character of the cars and the position of the brakeman were known to the conductor.

MASTER AND SERVANT—FELLOW-SERVANTS—CONDUCTOR IN CHARGE OF A RAILWAY TRAIN, AND A BRAKEMAN whose duty it is to obey his orders, are not fellow-servants, and the latter may therefore recover of their common employer for injuries suffered through the negligence of the former.

W. R. Staples and L. C. Berkelby, for the plaintiff in error.

Christian and Christian, and Randolph and Randolph, for the defendant in error.

LACY, J. The action was by the defendant in error for damages for personal injuries sustained while in the employment of the plaintiff in error as a brakeman.

The case is as follows: On the sixteenth day of February, 1888, at 2:45, A. M., the defendant in error was engaged in the crew of the yard-engine, shifting cars in the said city, on the side-tracks of the said plaintiff in error. It was the duty of the said defendant in error to couple and to uncouple cars. Having made a required coupling, he was directed by the conductor, who was his superior, and not his fellow-servant, to get upon the top of the cars and turn off the brakes, he saying: "Hop up, and let her go." He climbed upon the nearest ladder, and when he neared the top of the car he reached for the hand-hold to the ladder, and it was gone,—

had been broken off,—and he twisted his body to one side to reach the foot-board over the center of the top of the car to pull up. At this instant, the defendant in error carrying a lantern on his arm, the conductor signaled the engineer to come back, and by reason of his body being sideways, and the combing or roof of the cars coming very close together, and one dead-block being broken off, the body of the defendant in error was caught and mashed, injuring him seriously.

There was a demurrer to the evidence by the plaintiff in error, and a verdict by the jury, subject to the judgment of the court upon the demurrer, for two thousand dollars, and judgment was rendered for the plaintiff by the court, whereupon the case was brought here by writ of error.

The case will be heard and considered here upon principles well understood, when the case comes up upon a demurrer to the evidence: See *Richmond & D. R. R. Co. v. Moore*, 78 Va. 93; *Ware v. Stephenson*, 10 Leigh, 155, 161; *Trout v. Virginia & Tenn. R. R. Co.*, 23 Gratt. 619; *Green v. Judith*, 5 Rand. 1; *Hansbrough's Ex'rs v. Thom*, 3 Leigh, 147; *Stephens v. White*, 2 Wash. 203, 210; *Union Steamship Co. v. Nottinghams*, 17 Gratt. 115; 91 Am. Dec. 378.

The testimony of the plaintiff below, taken as true here, is, that the broken hand-hold was unknown to the plaintiff, the defective car having come in that night; that the conductor knew that these cars came so close together as to make it dangerous to go between them when in motion, and that he had so instructed the defendant in error; that the said conductor directed him to ascend them while standing; that before he got upon them, as he was in the act of ascending, and in a position which the conductor could see, or ought to have seen, as he carried a lantern, the conductor caused them to come back and take up the slack, and so injured him. This negligence of the conductor is the negligence of the company. And while it is true that the injury would nevertheless not have happened but for the defective ladder, this defective ladder was also the negligence of the company.

It is true that when a servant enters upon an employment, he accepts the service subject to the risks incident to it: *Clark v. Richmond & D. R. R. Co.*, 78 Va. 709; 49 Am. Rep. 394; *Darracott v. Chesapeake & O. R. R. Co.*, 83 Va. 288; 5 Am. St. Rep. 266; *Richmond & D. R. R. Co. v. Moore*, 78 Va. 93.

It is, however, the duty of the company to exercise all reasonable care to provide and maintain safe, sound, and

suitable machinery, roadway, structures, and instrumentalities; and it must not expose its employees to risks beyond those which are incidental to the employment, and even in contemplation at the time of the contract of service; and the employee has a right to presume these duties have been performed. Here was a broken ladder: See *Richmond & D. R. R. Co. v. Moore*, 78 Va. 93. Here was a railroad train set in motion by the conductor under such circumstances as to imperil the life of an employee, and to injure his person: See *Ayers v. Richmond & D. R. R. Co.*, 84 Va. 679; *Chicago etc. R. R. Co. v. Ross*, 112 U. S. 377; 17 Am. & Eng. R. R. Cas. 501; *Norfolk & W. R. R. Co. v. Cottrell*, 83 Va. 519.

The dangerous character of these cars was known to the conductor; the position of the brakeman, the defendant in error, was known to the said conductor. If he had waited until his order had been obeyed, and the brakeman was upon the car before he drove them together, the injury would not have happened; and the delay in getting up was caused by the broken ladder, which was the negligence of the company.

As the injury was caused solely by the negligent conduct of the company's agent, the case was clearly with the plaintiff on the demurrer to the evidence, for the company is clearly bound by the acts of the conductor in this case, who could not be held to be the fellow-servant of the defendant in error: *Chicago etc. R. R. Co. v. Ross*, 112 U. S. 377; 17 Am. & Eng. R. R. Cas. 501.

And the corporation court of Danville City, having rightly so decided, the judgment of that court must be affirmed.

MASTER AND SERVANT—MASTER'S DUTY TO SERVANT.—The master must furnish safe machinery and appliances to his servant: *Galveston etc. R'y Co. v. Garrett*, 73 Tex. 262; 15 Am. St. Rep. 781, and note. The servant has a right to presume that the master has performed his duty in this respect: *Magee v. North P. O. R. R. Co.*, 78 Cal. 430; 12 Am. St. Rep. 69.

MASTER AND SERVANT—FELLOW-SERVANTS.—The conductor of a railway train is not a fellow-servant with a brakeman of the same train: *Coxles v. Richmond etc. R. R. Co.*, 84 N. C. 309; 37 Am. Rep. 620; *Moos v. Richmond etc. R. R. Co.*, 78 Va. 745; 49 Am. Rep. 401. But see *McMaster v. Illinois C. R. R. Co.*, 65 Miss. 264, 7 Am. St. Rep. 653, where it is decided that a conductor and other employees on a passenger train are fellow-servants of a brakeman on a freight train of the same railway company.

FRY v. COUNTY OF ALBEMARLE.

[26 VIRGINIA, 198.]

COUNTIES ARE POLITICAL SUBDIVISIONS OF THE STATE, created by the sovereign power for the exercise of the functions of local government.

AS BETWEEN A COUNTY AND ITS OFFICERS, THE PRINCIPLES OF RESPONDEAT SUPERIOR do not apply, because the relation of master and servant does not exist. Such officers are *quasi* public officers of the state.

A COUNTY IS NOT ANSWERABLE IN DAMAGES TO A PERSON INJURED BY THE NEGLIGENCE of a convict who is working on a public highway under the direction and supervision of an officer of the county.

Davis and Harman, for the plaintiff in error.

Micajah Wood and H. M. Tyler, for the defendant in error.

LACY, J. The plaintiff in error here filed her petition before the board of supervisors of Albemarle County on the twenty-fifth day of July, 1887, representing that she came to Charlottesville in a buggy drawn by one horse, on the twenty-first day of April, 1887, from a point in the county of Albemarle, in company with another lady, who was riding in the same buggy. In the afternoon, about 4:30, P. M., on their way home, they were driving along one of the public roads of Albemarle County, going cautiously and carefully down a hill, when they came to a point where the public road was being worked on by a chain-gang composed of convicts out of the state prison, or penitentiary-house, at Richmond, organized by the county of Albemarle by authority of an act of assembly in that case made and provided, when, seeing a cart, with a mule hitched to it, moving up the hill, with one of these convicts walking by the side of the cart, they turned out of the way on their right-hand side as far as they could, and stopped and called out to the convict to look to the mule; that he was very slow to do this, and so slow and negligent about it that the cart collided with the buggy and turned it, together with its occupants, into the ditch on the road-side, and hurt the petitioner very much, by which she had been caused suffering, and loss in physician's fees and other expenses, and that she believed herself to be permanently injured; that this convict was an employee of the county of Albemarle, and that the county was therefore liable in damages for these personal injuries inflicted upon her by the county's servant, and she demanded five thousand dollars for the same.

This claim the board of supervisors rejected, and she appealed to the county court, where her petition was again re-

jected; and thereupon she appealed to the circuit court of the said county, when the judgment of the county court was affirmed; whereupon she brought the case here by writ of error.

The petition was rejected in the county court upon demurrer, so all we have to consider here is the single question whether the petition presents a case for which the county of Albemarle is liable to answer in damages.

The decision of the lower courts in this case is founded upon the principle that the sovereign cannot be sued except by its own consent, as may be provided by law, and that in the exercise of its sovereign power it is liable neither for misuse nor non-user, and that a county in this state is a political subdivision of the state for governmental purposes, as prescribed by public law, and is, no more than the state, liable to be sued for its public acts, and that it cannot be held chargeable for the acts of an officer whose duties are fixed and prescribed by law.

Suits against the state are allowed by law under certain regulations. And in certain specified and enumerated cases, counties in this state are authorized to sue, and are suable in the circuit court held for such county, in their own names; but these are limited. The thirteenth section of chapter 45 of the Code of 1873 provides that "counties may sue in their own names for forfeitures, fines, or penalties given by law to such counties, or upon contracts made with them, and may be sued in their own names, in the circuit court of such county."

The legislature has given a remedy in cases growing out of contracts with counties, but it has given no remedy against a county for the negligence of a public officer or servant appointed by law, and we may observe, as did Lord Kenyon long ago, that the question here is, "whether this body of men who are sued in the present action are a corporation, or a *quæ* corporation against whom such an action can be maintained. If it be reasonable that they should be by law liable to such an action, recourse must be had to the legislature for that purpose": 2 Term Rep. 671. "And even if we could exercise legislative discretion in this case, there would be great reason for not giving this remedy."

The rules established by the courts concerning municipal corporations have but slight application to counties organized as ours are. Our counties are parts of the state, political subdivisions of the state, created by the sovereign power, for the exercise of the functions of local government.

As was said by a learned judge in a case not now modern, "counties are at most but local organizations, which for the purposes of civil administration are invested with a few functions characteristic of a corporate existence. They are local subdivisions of a state, created by the sovereign power of the state, of its own sovereign will, without the particular solicitation, consent, or concurrent action of the people who inhabit them": *Hamilton County v. Mighels*, 7 Ohio St. 109.

A municipal corporation proper is created mainly for the interest, advantage, and convenience of its locality and its people.

A county organization is created almost exclusively with a view to the policy of the state at large, for purposes of political organization, and civil administration in matters of finance, of education, of provision for the poor, of military organization, of the means of travel and of transport, and especially for the general administration of justice.

With scarcely an exception, all the powers and functions of the county organization have a direct and exclusive reference to the general policy of the state, and are in fact but a branch of the general administration of that policy: Opinion of Brinkerhoff, J., in *Hamilton Co. v. Mighels*, 7 Ohio St. 109.)

In that case it was sought to make the county liable in damages to one who suffered a personal injury from the neglect of the commissioners of the county in the discharge of their official duties. And the court said: "But it is said the members of the board of county commissioners are chosen by the electors of the county, and hence the board is to be regarded as the agents of the county, for whose torts in the performance of official duties the county ought to be responsible. True, the people of the county elect the board of county commissioners; but they also elect the sheriff and treasurer of the county. Are the people of the county therefore responsible for the malfeasance in office of the sheriff, or for the official defalcations of the county treasurer? We cannot but think that county commissioners are not agents or representatives of the counties in any such sense or manner as to render the people of the county justly answerable for their neglect, even if the neglect be such as would create a civil liability against a natural person, or a municipal or private corporation." It is, he adds, "undoubtedly competent for the legislature to make the people of a county liable for the official delinquencies of the county commissioners; but this has not been done, and we

think such liability cannot be derived from the relations of the parties, either on the principles or the precedents of the common law." See also *Jacobs v. Hamilton Co.*, 4 Fish. Pat. Cas. 81; *Soper v. Henry Co.*, 26 Iowa, 264; *Treadwell v. Commissioners*, 11 Ohio St. 190; Angell and Ames on Corporations, secs. 14, 23, 24, 25; Dillon on Municipal Corporations, secs. 9, 32, 39, 761, 762.

In this case, the county of Albemarle is sued to recover damages resulting from the alleged negligence of a state convict engaged in working on the public roads of the state,—the public highways in the county of Albemarle belong to the commonwealth, not to the county,—and of the alleged negligence of a superintendent who was appointed by the authority of a state law.

No suit can be maintained against the county of Albemarle upon the principles of *respondet superior*, because the relation of master and servant did not exist; such officers are *quasi* public officers of the state. For although the officer in charge was appointed by the county, yet the office and duties incident to it were created by an act of the legislature, for the general public welfare, the public roads of Albemarle County being highways of the commonwealth, for the common benefit of all the people of the state, who have a right to use them.

We have been referred to numerous decisions concerning the character of the duty required of these and other officials similarly situated, drawing a distinction where the duty is for the benefit of the general public, and where it is for the benefit of a corporation, but we do not cite them. They are more distinctly applicable to municipal organizations proper than to such organizations as counties, which are rather political subdivisions of the state, or as sometimes denominated, *quasi* corporations.

Upon reason as well as upon authority, we are clearly of opinion that the judgment of the circuit court, affirming the judgment of the county court of Albemarle, was plainly right, and the same will be here affirmed.

COUNTIES — LIABILITY FOR ACTS OR NEGLIGENCE OF SERVANTS. — Counties are political corporations vested with such powers only as are given to them by the legislature creating them: *Louisville etc. R. R. Co. v. Davidson County*, 1 Sneed, 637; 62 Am. Dec. 424; *Morin v. Multnomah County*, 18 Or. 163. A county is merely a political division of a state, and is no more liable for the tortious acts or negligence of its officers, agents, or servants than the state, in the absence of a statute imposing such a liability: Note to *Gilman v. Centre*

Costa County, 68 Am. Dec. 295, 296. In *Askew v. Hale County*, 54 Ala. 639, 25 Am. Rep. 730, it was decided that a county was not answerable in damages to one injured by the negligent condition of its highway, even though the negligence was that of a convict employed by the county authorities to repair the highway.

WARD v. WHITE.

[86 VIRGINIA, 212.]

THE RES GESTÆ ARE THOSE CIRCUMSTANCES WHICH are the undesigned incidents of a particular litigated act, and which are admissible when illustrative of such act. These incidents may be separated from the act by a lapse of time more or less appreciable, but they must stand in immediate casual relation to the act, a relation not broken by the interposition of voluntary individual wariness seeking to manufacture evidence for itself.

EVIDENCE TO MITIGATE DAMAGES. — IN AN ACTION TO RECOVER COMPENSATION FOR PERSONAL INJURIES inflicted on the plaintiff by the defendant, the latter may show, in mitigation of damages, the provocation under which he acted, though it was not received at nor immediately preceding the time of the assault. Hence a defendant of whom compensation is sought for a murderous assault upon plaintiff may give in evidence in mitigation a defamatory article written and published by the plaintiff more than twenty-four hours prior to such assault.

NEW TRIAL. — THE AMOUNT OF DAMAGES RECOVERABLE IN ACTIONS FOR PERSONAL TORTS must be left to the discretion of the jury, and the court will not grant a new trial on the ground of the damages allowed being trivial or excessive, unless the verdict shocks the understanding and impresses the court with the conviction that it resulted from passion or prejudice. Therefore, though the plaintiff had been shot and dangerously injured by the defendant, and for many months languished of wounds which were then believed to be mortal, and the verdict of the jury gave him only \$1,375 damages, the court declined to interfere.

F. S. Blair and T. N. Williams, for the plaintiff in error.

O. F. Trigg and J. A. Walker, for the defendants in error.

LACY, J. This is a writ of error to a judgment of the circuit court of Washington County, rendered on the twentieth day of January, 1888. The action was trespass for a personal assault made by the defendants in error upon the plaintiff in error, shooting him down in the town of Abingdon on the twenty-seventh day of September, 1885.

On the trial the verdict was for the plaintiff, and damages assessed against the defendants for the sum of \$1,375, and judgment rendered by the court accordingly.

The plaintiff took sundry bills of exception at the trial, and after the verdict was rendered in his favor for the sum stated,

he was dissatisfied with the amount, his action being for twenty-five thousand dollars damages, and moved the court to set aside the same and grant him a new trial, which motion the court overruled and certified the evidence, whereupon the case was brought to this court by writ of error.

The evidence, so far as we deem it necessary to be stated, is as follows:—

Ward, the plaintiff in error, and plaintiff in the court below, was the editor of a newspaper in the town of Abingdon, which had a general circulation throughout the state of about one thousand. In the issue of that paper which appeared on the twenty-sixth day of September, 1885, the following appeared, referring to the defendant William White, the party who did the shooting: "The man that goes into a convention, and seeks the support of a convention, and then runs, without any valid reason, against the nominee of the convention, would steal the coppers off the eyes of a dead negro." Also: "We propose first to ask these questions, namely: William White. Why was he caucussing with the enemies of democracy at Wristner's warehouse? and how a man can honorably seek the nomination of the Democratic party, and because he did n't get it, become a traitor," etc.

Before the issue in question appeared, Ward absented himself on business, and was detained by severed railroad connection, so that he did not reach home until the day after the said publication.

It was proved that before the publication in question, Ward had threatened to attack White's private character, and been warned that if he did, White would shoot him, and he had boasted, with an oath, that he was no coward. White was an independent candidate for the senate, and had thus incurred the enmity of some of his fellow-men. When the publication was made, people called White's attention to these insulting comments upon him, and he became furiously angry, and showed such violence of excitement as to make it evident that a conflict would occur when the two men met. But Ward was absent, as has been stated, and only returned the next day. Upon the train Ward was warned that White was looking for him, and he opened his valise and transferred therefrom a revolver to his pocket. Riding up from the depot, in the hotel omnibus, Ward passed White coming down on the sidewalk in an excited way, going toward the depot. White turned and followed the omnibus, which, however, left him and went

on to the hotel, and Ward alighted without injury and went to his room, got his dinner, armed himself with another pistol, so that he had one in his hip pocket and one in his coat pocket. After moving about, going to his office and coming back, he retired to his room and lay down on the bed, and then came out on the street in the afternoon and saw one of the defendants, N. Gooch, and White sitting on the hotel porch, who got up and left as Ward came out, in a suspicious sort of way, but Ward, looking up and down the street to see if the course was clear, walked over to a drug-store and bought a cigar, and chatted a while with the druggist, who was his friend, about fifteen minutes, and then walked along the street back to his hotel, smoking a cigar, holding that in one hand and his cane in the other hand; but just before he reached the hotel, without warning, he was shot down, and falling, rolled over on his back, and saw across the street, William White, gun in hand, on the curbstone, looking, as the evidence states, like one of the characters in Dante's Inferno. Ward was badly shot, but he crawled to the porch and pulled himself up and over by the banisters into shooting position, as he says, and opened fire on Graham White, standing behind a tree. While Ward was crawling along to the porch, White shot at him again, but his aim was impaired by some one seizing the gun, and Ward was not again struck, although he and Graham White exchanged several shots. Ward was very badly hurt, and for many months languished of wounds which were thought very dangerous, and likely to result most unfavorably. But he got well, and none of the unfavorable results followed.

The first exception taken, and the first assignment of error here, is, that the court admitted in evidence the newspaper articles mentioned above.

It is insisted by the counsel for the plaintiff in error that the newspaper insults were too remote to have had any effect on the matter; that White had a whole day, and more, to get cool in; and that the articles could neither have been admitted in evidence correctly as matter in mitigation of damages, nor as part of the *res gestæ*, but should have been excluded altogether.

On the other side, it is insisted that they were properly admitted in evidence in mitigation of damages, and also as part of the *res gestæ*; and we are cited to the case of *Davis v. Franke*, 33 Gratt. 416, decided in this court in 1880.

In that case, Staples, J., says: "The authorities are gen-

erally agreed that in an action of trespass for an assault and battery, the defendant may, under the general issue, give in evidence matters which go mainly to the question of damages by palliating the offense. When the defendant relies upon provocation, it must be so recent as to raise the presumption that the assault was committed in heat of blood, excited by the conduct or declarations of the plaintiff. The rule which confines the defendant to proof of recent provocations received from the plaintiff is subject to modifications which more or less qualify the rule, according to the particular circumstances of each case."

Lord Abinger said, in *Fraser v. Berkely*, 32 Eng. Com. L. 558: "The law would be an unwise law if it did not make allowance for human infirmities; and if a person commit violence at a time when he is smarting under immediate provocation, that is mitigation. . . . It appears to me too severe to say you should not look at the cause which induced the assault."

Judge Staples, also, says, in the case of *Davis v. Franks*, 33 Gratt. 416, concerning the *res gestæ*: "It has been justly said that the affairs of men consist of a complication of circumstances so intimately interwoven as to be hardly separable from each other. Each owes its birth to some preceding circumstance, and in its turn becomes the prolific parent of others; and each, during its existence, has its inseparable attributes and its kindred facts, materially affecting its character, and essential to be known in order to a right understanding of its nature. These surrounding circumstances, constituting a part of the *res gestæ*, may always be shown to the jury in connection with the principal fact"; citing Mr. Justice Parke as saying, in *Rawson v. Haigh*, 2 Bing. 104: "It was impossible to tie down to time the rule as to declarations."

The area of events covered by the term "*res gestæ*" depends upon the circumstance of each particular case: Wharton on Evidence, 258. When a business man coolly and disengagedly completes half a dozen distinct negotiations in the course of an hour, the sweep taken by the *res gestæ* in each case is limited to what is done in the time of the particular negotiation: *Wiles v. Knott*, 12 Gill & J. 442. When, however, one man of high parts and great energy is employed in a single protracted negotiation of great importance, then we can conceive of his whole time for weeks being absorbed in

the negotiation, and of its so tingling with its characteristics everything that he does and says, that for all this period the things that he does and says become rather the incidents of the negotiation than of himself: *Fifield v. Richardson*, 34 Vt. 410; *Cunningham v. Parks*, 97 Mass. 172; *Muscogee R. R. Co. v. Redd*, 54 Ga. 33.

So if in one of our streets there is an unexpected collision between men, entire strangers to each other, then the *res gestæ* of the collision are confined within the few minutes that it occupied. When, again, there is a social feud in which two religious factions are arrayed against each other for weeks, and so much absorbed in the collision as to be conscious of little else, then all that such parties do and say under such circumstances is as much a part of the *res gestæ* as the blows given in the homicides for which particular prosecutions may be brought: Wharton on Evidence, sec. 259; *Commonwealth v. Sherry* and *Commonwealth v. Daley*, reported in the appendix to Wharton on Homicide; *Rex v. Gordon*, 21 How. St. Tr. 542.

The *res gestæ* may be, therefore, defined as those circumstances which are the undesigned incidents of a particular litigated act, and which are admissible when illustrative of such act: *Nutting v. Page*, 4 Gray, 584.

These incidents may be separated from the act by a lapse of time more or less appreciable. They must stand in immediate casual relation to the act, a relation not broken by the interposition of voluntary individual wariness, seeking to manufacture evidence for itself. Incidents that are thus immediately and unconsciously associated with an act, whether such incidents are doings or declarations, become in this way evidence of the character of the act. And Lord Denman, in *Ridley v. Gyde*, 9 Bing. 349, approving the saying of Baron Parke, above cited, "that it is impossible to tie down to time the declarations that may be made part of the *res gestæ*," said: "That if there be connecting circumstances, a declaration may, even at a month's interval, form part of the whole *res gestæ*." And Mr. Wharton says, upon the authority of numerous cases: "Therefore, declarations which are the immediate accompaniments of an act are admissible as part of the *res gestæ*, remembering that immediateness is tested by closeness, not of time, but by casual relation." And what is done is part of the *res gestæ*, as much as what is said.

Mr. Field, in his admirable work on the law of damages,

says: "In actions for willful injuries to the person, when vindictive damages are claimed, the defendant should not be restricted in proving matters which took place at the very time of the injury complained of. But he has a right to show the jury the true relations of the parties, and any facts and circumstances relating to the act, in order that they may determine how far it was wanton, malicious, vindictive, or unprovoked, or how far extenuated by the conduct, declarations, or provocations of the plaintiff": *Prentiss v. Shaw*, 56 Me. 427; 96 Am. Dec. 475; cited approvingly in *Davis v. Franks*, 33 Gratt. 416.

Upon the foregoing principles, we think the admission in evidence, by the court, of the newspaper articles was plainly right. They were the direct cause of the assault complained of; without them, therefore, there would have been no assault committed. To have exhibited the defendant to the jury in the attitude of a wanton assassin without cause or provocation shooting down a fellow-man who was guiltless of injury or offense toward him would have been a mockery of justice. How far these stinging insults mitigated the evil of the attack in question was a matter for the jury to determine; but there can be no doubt, there can be no denial, that the insulting words stood close to the act in question, in immediate casual relation thereto, and thus constituted part of the *res gestæ*, and as such are admissible in evidence. But they were also admissible in mitigation of damages; they caused the assault, provoked it, were of a character to greatly excite and inflame the passions of the defendant, and while the time extended itself through the period during which the whereabouts of the plaintiff were unknown, the subsequent meeting brought the whole matter vividly before the mind, and again ignited the passions of a man thus put under the ban of a newspaper insult, which was, at the very time of the assault, under the eyes of thousands of his fellow-men, and which tended toward his utter degradation. He was taunted with the matter on every hand, and so far from cooling, the lapse of time, itself short, and enforced by the absence of the offender, had only more and more excited the outraged passions of the defendant, and caused him to do an act which it is unreasonable to suppose he would have committed without them. They were properly admitted in mitigation of damages, and were as essentially a part of the case as the assault itself.

We come now to consider briefly the motion to set aside the

verdict because the damages assessed by the jury were insufficient and inadequate.

In personal torts and actions generally sounding in damages, it being within the strict province of the jury to estimate the injury, unless there be a manifest abuse, the court will not interfere. In its general acceptation, this rule applies equally to an unjust assessing of the damages, as to an intemperate excess.

Justice Buller says (Bull. N. P. 327): "In actions grounded upon torts, the jury are the sole judges of the damages; and therefore the court in such cases will not grant a new trial on account of the damages being trifling or excessive."

This was the rule at common law, and was strictly followed in this state until enlarged by statute: 1 Rob. (Va.) 378; 1 Rev. Code, p. 510, secs. 96, 97. And this court said, in *Rixey v. Ward*, 3 Rand. 52: "When a new trial is granted for such cause, it is not necessary to state in the record the grounds for awarding it, since it will be presumed that the order of the court, upon a subject which the statute has put within its jurisdiction, was correct, unless the contrary appeared": Code of 1873, c. 173, sec. 15, and the numerous cases cited.

But the question has nevertheless rested very largely in the discretion of the jury. It was said by this court, in the late case of *Daingerfield v. Thompson*, 33 Gratt. 136, 36 Am. Rep. 783: "The question of what damages the plaintiff sustained was a question for the jury to determine. The appellate court will not interfere with such a verdict unless it appears that the verdict is plainly extravagant and excessive."

The reason for holding parties so tenaciously to the damages found by the jury in personal torts is, that in cases of this class there is no scale by which the damages are to be graduated with certainty. They admit of no other test than the intelligence of the jury, governed by a sense of justice. It is, indeed, one of the principal causes in which the trial by jury has originated.

From the prolific fountain of litigation, numerous cases must daily spring up, calling for adjudication for alleged injuries, accompanied with facts and circumstances affording no definite standard by which these alleged wrongs can be measured, and which, from the necessity of the case, must be judged of and appreciated by the views that may be taken of them by impartial men. To the jury, therefore, as a favorite and almost sacred tribunal, is committed, by unanimous consent, the ex

clusive task of examining those facts and circumstances, and valuing the injury, and awarding compensation in the shape of damages. The law, which confers on them this power, and exacts of them the performance of the solemn trust, favors the presumption that they are actuated by pure motives. It therefore makes every allowance for different dispositions, capacities, views, and even frailties, in the examination of heterogeneous matters of fact, when no criterion can be supplied. And it is not until the result of the deliberations of the jury appears in a form calculated to shock the understanding, and impress no dubious conviction of their prejudice and passion, that courts have found themselves compelled to interfere: *Graham and Waterman on New Trial*, 452.

In this case there has been no definite proof of any actual outlay, costs, and expenses, except generally; and the jury seem to have been to some degree impressed with the injuries to the plaintiff, and his pain and anguish and loss of time; for while \$1,375 does not seem to satisfy the plaintiff, it doubtless appears to be a large sum to the defendant, and may have been so regarded by the jury. We have no evidence of the financial situation of the defendant, but this sum in this community would not be regarded as insignificant, and especially in view of the fact that the plaintiff, though greatly injured at the time, has sustained no permanent bodily injury.

The defendants in error submit without complaint to the verdict and judgment of the court below, and do not seek to have it disturbed here; but there is a principle of law, not alluded to or relied on here, which might have an important bearing on the case under its circumstances. It is this: "It is the duty of a person to use ordinary and reasonable care and means to prevent an injury, and the consequences of it; and he can only recover damages for such losses as could not, by such care and means, be avoided."

When a party, knowing he is to be attacked, arms himself with two pistols and goes forth to fight, it can scarcely be said that he did all in his power to avoid the injury which he receives. By such a course he attests his courage, but not so much that care and caution which is above suggested as essential to any recovery: *Field on Damages*, p. 29, sec. 32.

Upon the whole case, however, considering all the errors assigned, we are of opinion to affirm the judgment of the court below.

RES GESTÆ. — To be admissible as *res gestæ*, declarations need not take place immediately with the occurrence of the main act, but may be before and sometimes after, provided they be calculated to unfold the nature and quality of the facts they are intended to explain: *McDowell v. Goldsmith*, 6 Md. 319; 61 Am. Dec. 305; *Leahey v. Cass Ave. etc. R'y Co.*, 97 Mo. 165; 10 Am. St. Rep. 300, and note.

ASSAULT — EVIDENCE OF SLANDEROUS OR LIBELOUS WORDS IN MITIGATION OF DAMAGES. — A libel published in the morning does not mitigate an assault upon the libeler in the afternoon of the same day: *Keiser v. Smith*, 71 Ala. 481; 46 Am. Rep. 342; *Heiser v. Loomis*, 47 Mich. 16; nor can a defendant in an action for assault prove in mitigation of damages that plaintiff had on many occasions previous to the assault slandered him: *Fullerton v. Warrick*, 3 Blackf. 219; 25 Am. Dec. 99. To mitigate damages in such cases by a proof of provocation by the injured party, it must appear that the assault was committed during the continuance of the passion excited by the provocation, and before his blood had time to cool: *Ireland v. Elliott*, 5 Iowa, 478; 68 Am. Dec. 715. Where defendant has admitted that he committed the assault charged, evidence is properly excluded tending to show that his wife had been insulted by plaintiff some hours before, and that he had just learned of it at the time of the assault: *Dupee v. Lentine*, 147 Mass. 580.

NEW TRIAL — EXCESSIVE VERDICTS. — The appellate court will not set aside a verdict as excessive, unless it clearly appears that the jury were actuated by passion or prejudice: *Stutz v. Chicago etc. R'y Co.*, 73 Wis. 147; 9 Am. St. Rep. 769, and note; *Western Union Tel. Co. v. Broesche*, 72 Tex. 654; 13 Am. St. Rep. 843, and note; *Gulf etc. R'y Co. v. Redeker*, 75 Tex. 310; 16 Am. St. Rep. 887, and note.

HICKS v. COMMONWEALTH.

[6 VIRGINIA, 223.]

CRIMINAL LAW. — INDICTMENT FOR AN ATTEMPT TO COMMIT A CRIME must allege some act done by the defendant, of such a nature as to constitute an attempt, in the legal sense, to commit an offense.

CRIMINAL LAW. — THE CRIME OF AN ATTEMPT TO COMMIT AN OFFENSE is compounded of two elements: 1. An intent to commit it; and 2. A direct, ineffectual act done towards its commission. It must approach sufficiently near to the crime intended to be committed to stand either as the first or some subsequent step in a direct movement towards the commission of the offense after the preparations are made.

CRIMINAL LAW. — THE CRIME OF ATTEMPTING TO ADMINISTER POISON IS NOT ESTABLISHED by proof that the defendant purchased poison, and ineffectually solicited another to put it in the food or drink of a third person.

William M. Perkins, Hoge and Hoge, and George E. Cassell,
for the plaintiff in error.

Attorney-General R. A. Ayers, for the commonwealth.

LEWIS, P., The indictment charges, in substance, that George W. Hicks (the plaintiff in error here) and Nancy Price,

feloniously intending to kill the said James Anderson, did attempt to administer to him a quantity of poison called strychnine, by soliciting one Laura Long, for a promised reward, to administer the same; and that they, in furtherance of their design to kill as aforesaid, did deliver to the said Laura Long a quantity of the said poison, to be by her put into the coffee of the said Anderson, who at the time was boarding with her, etc. It is not charged, however, that she agreed to administer the poison, or that she did any act towards the commission of the crime.

There was a demurrer to the indictment, which was overruled, and the said Hicks, having been tried separately, pursuant to his election, was found guilty. He thereupon moved for a new trial, which motion was overruled; to which action of the court he excepted, and the facts are certified in the bill of exceptions.

The punishment for an attempt to administer poison is prescribed by section 3669 of the code, which enacts as follows: "If any person administer, or attempt to administer, any poison or destructive thing in food, drink, medicine, or otherwise, or poison any spring, well, or reservoir of water, with intent to kill or injure another person, he shall be confined in the penitentiary not less than three nor more than five years."

The principal witness for the commonwealth was Mrs. Laura Long, whose uncontradicted evidence is substantially as follows: That on several occasions, at the house of the witness, in Pulaski County, the first being on the 31st of August, 1888, the prisoner spoke to her about poisoning "old man Anderson," and said he knew Mrs. Price would approve it, as she had proposed to him (Hicks) to poison him.

On the 18th of September the prisoner passed the house of the witness on his way to Central to get the poison, saying to her as he passed, that Mrs. Price had given him the money to buy it with. On his return, he stopped at the house of the witness, and showed her the poison he had purchased. It was wrapped up in a paper, which was inside of an envelope, "which had on it a skull and bones and reading." It was strychnine, and he said he had gotten it that day at a drug-store at Central. He told the witness he wanted her to go with him to the spring, near by, where Mrs. Price would meet them, and deliver the poison to her, and tell her all about it. The witness said she could not go then, but would meet them there that night, about eight o'clock, if that would suit. To

this the prisoner answered that it would suit a great deal better, and that he would be present to see the poison delivered, and to witness the agreement. He then went on his way.

The witness went to the spring at the appointed hour, and after waiting there a little while, Mrs. Price arrived. She had a small package in one hand which she said contained strychnine, and an envelope in the other. The package she handed to the witness, saying, "Here it is." She then directed the witness to put the poison in the old man's coffee that night when she got home, and told her as soon as he got "passed speaking and dropped" to give the alarm, and to say that the old man had fallen dead; for all which, she offered to reward her liberally. She said George (the prisoner) was "right out there," pointing in the direction of the corn-field. The witness looked, and saw some one there, and called the prisoner, but he did not answer. Just then, at a signal from the witness, several men, in hiding near by, rushed up, and Mrs. Price ran away, and the witness delivered to one of these men (a Mr. Brown) the package of poison she had just received from Mrs. Price. The witness also testified that she never agreed to administer the poison, and never intended to do so, and that she would not have done it for anything. "I wanted to fool Hicks," she said, "because I wanted to catch him and to let other people know it."

The connection of the prisoner with the matter, as detailed by Mrs. Long, is fully established by the record, and the question therefore is, whether these facts constitute an indictable attempt within the meaning of the law. We are of opinion that they do not, and as they substantially correspond with the allegations of the indictment, it follows that the demurrer to the indictment ought to have been sustained. It is an elementary rule of criminal pleading that an indictment in a case like the present must allege some act done by the defendant of such a nature as to constitute an attempt, in a legal sense, to commit the contemplated offense; otherwise, the indictment will not be sufficient: *Clarke's Case*, 6 Gratt. 675; 1 Wharton's Crim. Law, 9th ed., sec. 192.

The question as to what is such an act is often a difficult one to determine, and no general rule which can be readily applied as a test to all cases can be laid down. It has been truly said by a philosophical writer that "the subject of criminal attempt, though it presses itself upon the attention wherever we walk through the fields of the criminal law, is very

obscure in the books, and apparently not well understood either by the text-writers or the judges." And it may be added that it is more intricate and difficult of comprehension than any other branch of the criminal law. Each case must therefore be determined upon its own facts, in the light of certain principles which appear to be well settled. The difficulty generally is in determining the proximity of the act in question to the offense in contemplation.

An attempt to commit a crime is compounded of two elements: 1. The intent to commit it; and 2. A direct, ineffectual act done towards its commission: Code, sec. 3888; 2 Bishop's Crim. Prac., sec. 71. Or as Wharton defines it, "an attempt is an intended, apparent, unfinished crime." Therefore, the act must reach far enough towards the accomplishment of the desired result to amount to the commencement of the consummation. It must not be merely preparatory. In other words, while it need not be the last proximate act to the consummation of the offense attempted to be perpetrated, it must approach sufficiently near to it to stand either as the first or some subsequent step in a direct movement towards the commission of the offense after the preparations are made: *Uhl v. Commonwealth*, 6 Gratt. 706; *McDade v. People*, 29 Mich. 50.

Thus it has been often held, under statutes similar to our own, that the purchase of a gun with intent to commit murder, or the purchase of poison, with the same intent, does not constitute an indictable offense, because the act done in either case is considered as only in the nature of a preliminary preparation, and as not advancing the conduct of the accused beyond the sphere of mere intent. "To make the act an indictable attempt," says Wharton, "it must be a cause as distinguished from a condition. And it must go so far that it would result in the crime unless frustrated by extraneous circumstances": 1 Wharton's Crim. Law, sec. 181.

This is well illustrated by the case of *People v. Murray*, 14 Cal. 159. In that case, the defendant was indicted for an attempt to contract an incestuous marriage with his niece. It was shown that after declaring his intention to marry her, he actually eloped with her, and sent for a magistrate to perform the ceremony; and at the trial he was convicted. But on appeal, the judgment was reversed, the appellate court holding that these were mere preparations, and did not constitute an attempt within the meaning of the statute.

In delivering the unanimous opinion of the court, Field, C. J., said: "The evidence shows very clearly the intention of the defendant; but something more than mere intention is necessary to constitute the offense charged. Between preparation for the attempt, and the attempt itself, there is a wide difference. The preparation consists in devising or arranging the means or measures necessary for the commission of the offense; the attempt is the direct movement toward the commission, after the preparations are made. To illustrate: a party may purchase and load a gun, with the declared intention to shoot his neighbor; but until some movement is made to use the weapon upon the person of his intended victim, there is only preparation, and not an attempt. For the preparation, he may be held to keep the peace; but he is not chargeable with an attempt to kill. So in the present case, the declarations, and elopement, and request for a magistrate, were preparatory to the marriage; but until the officer was engaged, and the parties stood before him, ready to take the vows appropriate to the contract of marriage, it cannot be said, in strictness, — i. e., in a legal sense, — that the attempt was made. The attempt contemplated by the statute must be manifested by acts which would end in the consummation of the particular offense but for the intervention of circumstances independent of the will of the party."

The same principle was recognized by the supreme court of Pennsylvania in a recent case, and one which bears a striking resemblance to the case before us. There the defendant was indicted and convicted for an attempt to administer poison, under a statute the provisions of which are substantially the same as those of our own statute. It was proved at the trial that the defendant, in a conversation with a witness, Neyer, stated his grievance against his intended victim, Waring, and his determination to be revenged, and then solicited Neyer to put poison in Waring's spring, so that he and his family would be poisoned, offering him a reward therefor. He also gave him directions how to administer the poison, and gave him the poison to be administered. But the witness refused to have anything to do with it, and handed it back to the defendant, and testified that he never intended to administer it.

Upon these facts, the supreme court held that all that occurred at the interview with the witness, and the legal inferences deducible therefrom, followed by no other act, were not sufficient to warrant a conviction for an attempt to commit the

felony charged; that the act proved did not approximate sufficiently near to the commission of murder to establish an attempt to commit it within the meaning of the statute; and the judgment was accordingly reversed. "Merely soliciting one to do an act," said the court, "is not an attempt to do that act. . . . In a high, moral sense, it may be true that solicitation is an attempt; but in a legal sense, it is not: *Stabler v. Commonwealth*, 95 Pa. St. 318; 40 Am. Rep. 653.

The court, in its opinion, also referred to the case of *Regina v. Williams*, 1 Car. & K. 589, 1 Den. C. C. 39, which was a prosecution under the third section of the act of 1 Victoria, from which the Pennsylvania statute was substantially copied; and in that case it was held that the delivery of poison to an agent, with directions to him to cause it to be administered to another, was not sufficient to establish an attempt to murder. In that case the agent was actually given money for his services, and immediately proceeded with the poison to the house of the intended victims; but upon his arrival there, he gave up the poison to them, and told them all about it. The prisoners were convicted, but at the ensuing term the case was considered by the fifteen judges, who held the conviction wrong.

The application of these principles to the facts of the present case shows very clearly, we think, that the judgment is erroneous. Here, undoubtedly, there was an intent to commit murder; but the acts done do not amount to anything more than the mere arrangement of the proposed measures for its commission. They were nothing more than mere preparations, and even the intended preparations were not completed before the criminal design was frustrated. The means intended to be employed to consummate the offense were, — 1. The purchase of poison; and 2. The delivery of the poison to an agent, to be by her administered. But as the party to whom the poison was delivered refused to administer it, or to do any act in furtherance of the design, there has been no direct act done towards the commission of the offense; and consequently no attempt, in a legal sense, to commit the crime has been established. In other words, the acts proved — no matter how, in a moral point of view, they may be regarded — do not, in the eye of the law, approximate sufficiently near to the commission of murder to advance the conduct of the prisoner beyond the sphere of mere intent.

That the mere delivery of poison by one person to another,

for the purpose disclosed by the record in the present case, does not constitute an attempt to administer poison within the meaning of the statute is clear, we think, because it is not such an act as is likely, in the natural course of events, to bring about the result desired. On the contrary, the presumption in such a case is the other way, since a criminal intent on the part of the person to whom the poison is delivered is not to be presumed; and hence, for this reason, if no other, the act of delivering the poison is not such a one as can be considered a judicial cause, or a direct step in the actual endeavor to commit a crime,—without which there can be no attempt within the meaning of the statute: 1 Wharton's Crim. Law, 9th ed., sec. 178.

We are therefore constrained to hold that the conviction is wrong, and that the judgment must be reversed, and the demurrer to the indictment sustained. If the law be defective in not reaching a case like the present, as it does not, the legislature, not the courts, can remedy the defect. We can only administer it as it is.

HINTON, J. (dissenting). I am of the opinion that the indictment, although inartificially drawn, is an indictment under section 3888 of the Code of 1887, and so regarding it, that the crime imputed to the prisoner is fully established. And I am further of opinion that if it be regarded as an indictment under section 3669, that the prisoner should not be discharged, but be held to await an indictment, to be preferred under section 3888 of said code: See *People v. Bush*, 4 Hill, 133; *Stabler v. Commonwealth*, 95 Pa. St. 318; 40 Am. Rep. 653. The acquittal of one offense does not operate as a bar to a prosecution for another and distinct substantive offense. I am therefore constrained to dissent from the opinion of the majority of the court: See *Page v. Commonwealth*, 26 Gratt. 943.

Judgment reversed.

CRIMINAL LAW — ATTEMPT TO COMMIT A CRIME. — Solicitation to commit an offense does not constitute an attempt in a legal sense: *Smith v. Commonwealth*, 54 Pa. St. 209; 93 Am. Dec. 686; note to *Stabler v. Commonwealth*, 40 Am. Rep. 656, 657. Compare *Hamilton v. State*, 26 Ind. 280; 10 Am. Rep. 22; note to *Moran v. People*, 12 Am. Rep. 291.

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SHENANDOAH VALLEY RAILROAD COMPANY v. ASHBY'S TRUSTEES.

[36 VIRGINIA, 232.]

JUDGMENTS — PRESUMPTION OF JURISDICTION. — If a statute requires a return of service of process to state certain jurisdictional facts, no presumption will be indulged in favor of a judgment based upon a return which omits such facts, and the judgment will be treated as void when attacked collaterally.

AMENDMENT OF AN OFFICER'S RETURN OF SERVICE OF PROCESS RELATES back to and becomes a part of the original return, and may therefore impart validity to a judgment which, but for such amendment, would have been treated as void.

AMENDMENT OF A RETURN OF SERVICE OF PROCESS MAY BE MADE AFTER THE OFFICER has gone out of office.

AMENDMENT OF RETURN OF SERVICE OF PROCESS WILL BE ALLOWED to be made so as to show that the court had jurisdiction when it entered the judgment, though before the amendment is made other judgments have been recovered against the defendant, which, but for the amendment, would be paramount liens against his property.

W. H. Travers, for the plaintiff in error.

J. J. Williams, for the defendant in error.

LEWIS, P. It appears from the record that on the 4th of September, 1874, Thomas N. Ashby instituted an action of debt in the said court against the Shenandoah Valley Railroad Company for the sum of \$5,231.90, and \$11.90 costs, upon the transcript of a record of a judgment which he had previously recovered against the said company in one of the courts of West Virginia. On the original summons sued out in the action, return was made by John T. Lovell, a deputy of L. Leach, sheriff of Warren County, as follows:—

“Executed the within summons in debt on September 5, 1874, upon M. B. Buck, one of the directors of the Shenandoah Valley Railroad Company, by delivering to him a copy thereof. JOHN T. LOVELL, D. S., for L. LEACH, S. W. C.”

At the ensuing October term, a judgment by default was rendered for the plaintiff for the sum claimed in the declaration, which judgment was several years afterwards asserted by the trustees of the plaintiff, the defendant in error here, as a lien upon the property of the defendant company, in a certain chancery suit pending in the circuit court of Roanoke City, wherein the Fidelity, Insurance, Trust, and Safe Deposit Company was plaintiff, and the said railroad company was defendant. But the claim was rejected, on the ground that

the judgment was void because there had been neither service of process upon nor voluntary appearance by the defendant in the action wherein the judgment was recovered. Subsequently the trustees, after due notice, to wit, on the 20th of October, 1887, moved the circuit court of Warren County to permit the return to be amended, which motion was granted. and the return was accordingly amended by Lovell so as to read as follows:—

“Executed the within summons in debt on September 5, 1874, upon M. B. Buck, one of the directors of the Shenandoah Valley Railroad Company, by delivering to him a copy hereof, in the county of Warren, Virginia, in which county he resided at the time.

“JOHN T. LOVELL, D. S., for L. LEACH, S. W. C.”

The defendant company, the plaintiff in error here, complains of this action of the circuit court, permitting the return to be amended, and the principal ground of its complaint is, that inasmuch as the original return does not show that the summons was served in conformity with the requisitions of the statute relating to the service of process in such cases, upon the officers of a corporation, the service was without legal effect, and consequently the judgment founded upon it is void, and cannot be validated by amendment of the return.

There is no doubt that the original return is defective, and does not of itself show that the defendant company was legally brought before the court, since the statute expressly enacts that service of process in such a case, upon an officer of a corporation, shall be in the county or corporation in which he resides, and that “the return shall show this, and state on whom and where the service was; otherwise the service shall not be valid”: Code 1873, c. 166, sec. 7; Code 1887, sec. 3227.

It must therefore be conceded that unless leave to amend the return was rightly granted, the judgment is void: *Barksdale v. Neal*, 16 Gratt. 314; 4 Minor's Institutes, 532. Without the amendment, the record presents a case, not of a defective service merely, but of no service at all. In other words, it presents the case of a judgment rendered by a court without having acquired jurisdiction over the defendant, which is simply a nullity. The rule that a court of general jurisdiction, acting within the scope of its authority, is presumed to act rightly, and to have jurisdiction to render the judgment

it pronounces, until the contrary appears, applies only as to those matters concerning which the record is silent; nor can it operate in a case like the present, to supply jurisdictional facts which the return, according to the statute, must show affirmatively: *Harris v. Hardeman*, 14 How. 334; *Settlemier v. Sullivan*, 97 U. S. 444; *Rickards v. Ladd*, 6 Saw. 40.

We are of opinion, however, that the circuit court did not err in permitting the return to be amended, and that viewing the case in the light of the amended return, the judgment is valid and unassailable. The case is not within the principle that proceedings which are void *ab initio* cannot be rendered valid by amendment, for here the effect of the amendment was, not to confer jurisdiction upon the circuit court, but only to perfect the proof of the jurisdiction which it had previously acquired, but of which the evidence prescribed by the statute was wanting. In other words, the amendment, by relating back to the original return, and becoming, in effect, a part of it, shows, in the prescribed form and manner, that the defendant company was duly served with process, and hence had notice and an opportunity to be heard, which are essential requisites to the jurisdiction of all courts: *Dorr v. Rohr*, 82 Va. 359; 3 Am. St. Rep. 106.

The extensive power with which every court is ordinarily clothed, to permit an amendment of a return of its own process, whether original, mesne, or final, for the correction of a casual and honest mistake or omission, is not affected by the statute above referred to, and may be exercised in all cases where it exists at all, as well after judgment as before. In some cases it has been exercised even to the extent of taking away altogether a cause of action growing out of the original return, and even though a suit or motion founded on the original return was pending at the time. And it makes no difference that the officer by whom the return was made has gone out of office, there being no specific limitation of time within which the power may be exercised, although after a considerable lapse of time it should be exercised with caution, and in no case ought it to be exercised unless the court can see that it will be in furtherance of justice.

In a proper case, however, leave to amend, so as to make the return speak the truth, ought to be, and usually is, liberally granted, and when the amendment is made, the same effect is to be given to the return as amended as though it had at first been put in its present form. In other words, "the amendment

takes effect by relation, and operates as if made at the same time as the original return": Freeman on Executions, secs. 359, 360; 4 Minor's Institutes, 839; *Stone v. Wilson*, 10 Gratt. 529; *Walker v. Commonwealth*, 18 Gratt. 13, 51; *Rickards v. Ladd*, 6 Saw. 40; *Stotz v. Collins*, 83 Va. 423, and cases cited.

This being so, it follows that the objection founded upon the form of the original return cannot be sustained. Nor is the position maintainable that the amendment operates to the prejudice of certain creditors of the defendant company, whose debts are secured by mortgages executed subsequent to the rendition of the judgment in October, 1874.

There are cases which hold, and we do not question the doctrine, that an amendment of a return will not be permitted to affect injuriously the rights of third persons which have attached in the mean time, and which were acquired upon the faith of the verity of the original return. But the present is not a case of that class. The judgment was duly docketed, and there is nothing in the record to show that when the mortgages were executed the judgment was not supposed to be valid. At all events, the liens were acquired subject to the right of the plaintiff in the judgment to have the record perfected, as has been done.

The order permitting the amendment must therefore be affirmed, with costs.

JUDGMENT—PRESUMPTION AS TO JURISDICTION.—The presumption of jurisdiction is rebutted when the record shows a service upon defendant which is insufficient: *Clark v. Thompson*, 47 Ill. 25; 95 Am. Dec. 457. Want of jurisdiction appears when the record states service of some kind, but such service as is not, under the statute, sufficient to give jurisdiction: *Hahn v. Kelly*, 34 Cal. 391; 94 Am. Dec. 742. It appearing upon the record that summons in an action was served in a manner ineffectual to confer jurisdiction, it will not be presumed that a valid service was made in some other way: *Barber v. Morris*, 37 Minn. 194; 5 Am. St. Rep. 836.

OFFICER'S RETURN, AMENDMENT OF.—An amendment of a sheriff's return may be made after judgment, to show that process was properly served upon the defendant: *Allison v. Thomas*, 72 Cal. 562; 1 Am. St. Rep. 89; *Heflin v. McMinn*, 2 Stew. 492; 20 Am. Dec. 58; note to *Malone v. Samuel*, 13 Am. Dec. 173 et seq. An officer may, by leave of court, amend his return so as to make it conform to the actual facts constituting the service, even after the expiration of his term of office: Note to *Malone v. Samuel*, 13 Am. Dec. 177, 178. An amendment, whenever made, relates back to the original return, and dates from it: Note to *Malone v. Samuel*, 13 Am. Dec. 180, 181; *Woodward v. Harbin*, 4 Ala. 534; 37 Am. Dec. 753.

PATTON v. LEFTWICH.

[86 VIRGINIA, 42L.]

SURVIVING PARTNERS MAY MAKE AN ASSIGNMENT OF THE FIRM PROPERTY FOR THE BENEFIT OF ITS CREDITORS, AND MAY GIVE A PREFERENCE TO one creditor or set of creditors, to the same extent that all of the partners could, were all still living.

DEBTOR AND CREDITOR — PREFERENCES. — Every debtor has the right to prefer one of his creditors to another, in the absence of a statute forbidding it, and the case of a surviving partner who is a debtor is no exception to the rule.

John W. Daniel, and McKenny and Berry, for the appellant.

E. C. Burks and R. H. G. Kean, for the appellees.

FAUNTLEROY, J. R. F. Robertson, R. M. Leftwich, and W. H. Stiff, early in the year 1885, entered into partnership, under the firm name of R. F. Robertson & Co., in the town of Liberty, Bedford County, Virginia, for the manufacture and sale of chewing and smoking tobacco, etc. In October, 1885, R. F. Robertson died, and the said partnership was dissolved, *ipso facto*, by his death, by operation of law. Said Robertson died intestate and insolvent, and his estate was committed to the sheriff of Bedford County, as administrator *de bonis non*, after the revocation of the powers of his father, F. W. Robertson, as administrator.

The partnership assets at the date of dissolution by the death of the partner R. F. Robertson consisted of a large number and amount of debts due to the said firm, and also a large quantity of unmanufactured tobacco, manufactured tobacco, and machinery and furniture used in the business, — all personalty; no realty.

The surviving partners, Leftwich and Stiff, began to wind up the partnership affairs; but finding, in the course of liquidation, that the partnership liabilities were greater than the assets would pay, the said Leftwich and Stiff, as said surviving partners, on the 6th of February, 1886, made an assignment to P. L. Saunders, trustee, of all the partnership assets of the late firm of R. F. Robertson & Co., in trust, to pay, first, two negotiable notes of the said firm, held by the Liberty Savings Bank, one for two thousand five hundred dollars, payable to and indorsed by McGhee and Hurt, dated —, and the other, for two thousand dollars, payable to and indorsed by McGhee, Hurt, & Co., dated —; second, to pay two other negotiable notes of said firm, held by the said Lib-

erty Savings Bank, one for two thousand dollars, payable to and indorsed by Wesley Peters, dated —, and the other for one thousand dollars, payable to and indorsed by Jeter and Newsom, dated —; third, to pay all other indebtedness due the said Liberty Savings Bank by the said late firm; and lastly, to distribute the surplus, if any.

On the 9th of December, 1887, James D. Patton, a creditor of the late firm, instituted this suit — a creditor's suit — in the circuit court of Bedford County, against the said Leftwich and the said Stiff, surviving partners, Saunders, trustee, the Liberty Savings Bank, and the administrator of R. F. Robertson, deceased. With his said bill, J. D. Patton filed a copy of the said assignment and schedule, and exhibits the evidences of the indebtedness of the insolvent firm to him. He does not waive answers on oath. The Liberty Savings Bank filed its answer by its president. The trustee, Saunders, filed his answer on oath, and Leftwich and Stiff filed their answer on oath.

The complainant, Patton, charges in his bill that the said surviving partners, Leftwich and Stiff, had no rightful power or authority in law to make an assignment of the assets of an insolvent firm which had been dissolved by the death of a partner, nor to give preference to the bank, or to any one or more of the creditors of the firm, over the other creditors of the firm, of equal dignity. And the prayer of the bill is, that the assignment of Leftwich and Stiff, of February 6, 1886, as surviving partners of the late firm of R. F. Robertson & Co., be annulled and set aside, and that accounts be ordered and taken of the partnership assets in the hands of the trustee and assignee, and of all other social assets, if any, not included in the said assignment; of the debts due by the said late partnership; of the notes discounted and held by the Liberty Savings Bank, and of the application made of the proceeds of said discounts; and of the individual property of R. F. Robertson, deceased, and of Leftwich and of Stiff.

On the 9th of December, 1887, the circuit court of Bedford County, by its final decree, simply dismissed the bill, with costs to the defendants. From this decree, Patton obtained this appeal.

The bill charges fraud, and collusion of fraud; but the answers are fully and explicitly responsive, and they deny the allegations and specifications of fraud made in the bill, and there is no proof whatever, or even an attempt, to prove the

fraud charged. Indeed, the petition for appeal, and the briefs of counsel for appellant, do not present the question of fraud. There is no dispute as to the facts in the case. The question presented for adjudication, and the one on which the case turns, is purely and simply one of law, as to the powers and duties of surviving partners of an insolvent firm dissolved by death, and the counsel for appellant, in their brief, state the question thus: "Whether the surviving partners of an insolvent firm can make a valid assignment to a trustee of all the effects of the partnership, preferring one, and postponing all others of the social creditors." The appellant contends that all the social creditors of same dignity must be paid ratably; that by the death of the partner Robertson, the surviving partners, Leftwich and Stiff, became, by operation of law, trustees of the partnership property, which, as such trustees, they were bound to apply, ratably, to the payment of the partnership debts; and that they had no lawful power or capacity to discriminate among the social creditors so as to give preference either in payment or security by assignment; and that in this case the assets being insufficient to pay or secure all, and the partners being insolvent, it was a breach of trust in the surviving partners, Leftwich and Stiff, to make the assignment of February 6, 1886, which, in equity, is void as to the social creditors who are postponed by the said assignment.

The question submitted is one of very great importance, affecting large interests and rights in the commercial world; and yet it has never, it is believed, been presented before this court in this definite form. But the supreme court of the United States has adjudicated the precise question and the exact point at issue here: *Fitzpatrick v. Flannagan*, 106 U. S. 654; *Emerson v. Senter*, 118 U. S. 3. In this last-mentioned case the supreme court of the United States says: "As with the concurrence of all the partners the joint property could have been sold or assigned for the benefit of the preferred creditors of the firm, the surviving partner, there being no statute forbidding it, could make the same disposition of it. The right to do so grows out of his duty, from his relation to the property, to administer the affairs of the firm so as to close up its business without unreasonable delay; and his authority to make such a preference — the local law not forbidding it — cannot, upon principle, be less than that which an individual debtor has in the case of his own creditors." And the language of the *syllabus* of the case is: "The surviving part-

ners of an insolvent firm, who are themselves insolvent, may make a general assignment of all the firm's assets, for the benefit of all joint creditors, with preferences to some of them; and such assignment is not invalidated by the fact that the assignors fraudulently withheld from the schedule certain partnership property for their own benefit, without the knowledge of the assignee or the beneficiaries of the trust." See *Egberts v. Wood*, 3 Paige, 517; 24 Am. Dec. 236, and note; *Hutchinson v. Smith*, 7 Paige, 26; *Wilson v. Soper*, 13 B. Mon. 411; 56 Am. Dec. 573, and note; *Loeschigk v. Hatfield*, 51 N. Y. 660; *Cushman v. Addison*, 52 N. Y. 628; *Williams v. Whedon*, 109 N. Y. 333; 4 Am. St. Rep. 460 (decided in 1888); *French v. Lovejoy*, 12 N. H. 458; note to *Shields v. Fuller*, 65 Am. Dec. 295-303; *Barry v. Briggs*, 22 Mich. 201.

In the very recent case of *Williams v. Whedon*, 109 N. Y. 333, 4 Am. St. Rep. 460, the New York court of appeals reviews many prior cases, and refers to *Emerson v. Senter*, 118 U. S. 3, as conclusive. In the case of *French v. Lovejoy*, 12 N. H. 458, the court of appeals of New Hampshire says (p. 459): "The property of the partnership might be lawfully appropriated to the payment of the partnership debts; and F. Lovejoy, as surviving partner, had the right to prefer A. Lovejoy, a creditor of the firm, in that way." In *Barry v. Briggs*, 22 Mich. 201, Chief Justice Campbell, speaking for the Michigan court, says: "A sole surviving partner has the entire legal title to all the partnership assets. He has a right, acting honestly and with reasonable discretion and diligence, to dispose of them as he pleases, to settle all debts against the concern, to make any compromise he may deem necessary, and to turn the assets into an available and distributable form."

Bates on Partnership (vol. 2, sec. 732) says: "As the surviving partner has the entire title and sole control of the property, and represents the power of all the former partners, and they all could have assigned the property for the benefit of creditors, so the surviving partner has, at least in the case of insolvency, in order to wind up, the same power, and can transfer the property to an assignee for the benefit, not of his separate creditors, but of the partnership creditors. . . . And as he (the surviving partner) can pay some creditors in full, to the prejudice of others, so it has been held that, if the local law does not forbid, in case of other assignments for creditors, he can assign with preferences." And for this last

proposition the author cites, among others, the case of *Emerson v. Senter*, 118 U. S. 3.

The cases of *Fitzpatrick v. Flannagan*, 106 U. S. 648, and *Case v. Beauregard*, 99 U. S. 119, are cited in the recent case, decided by this court, of *Robinson v. Allen*, 85 Va. 721. See the case of *Beste v. Burger*, 110 N. Y. 644.

Even real estate bought with partnership funds, the title of which is taken in the name of the deceased partner, is so completely in the control of the surviving partner, that where he assigned to a trustee, and the trustee sold, the purchaser of this equitable title can, in equity, compel the heirs of the deceased partner to convey the legal title to him: *Shanks v. Klein*, 104 U. S. 18.

The cases referred to in the brief of counsel for appellant (*Salisbury v. Ellison*, 7 Col. 167, 49 Am. Rep. 347, and *Anderson v. Norton*, 15 Lea, 14, 54 Am. Rep. 400) are rested on the ground that the surviving partner is a trustee for the benefit of the firm's creditors, and is governed by the rules applying to ordinary trustees; and that, as in the cases of ordinary trustees, "equality is equity." The surviving partners, being trustees, cannot give any preference among the creditors. But surviving partners are not trustees, in the ordinary sense, though they are loosely so called by some judges and law-writers. Lord Chancellor Westbury, in *Knox v. Rye*, L. R. 5 H. L. 656, 675, cited in 2 Pomeroy's Eq. Jur., 618, note 2, says that the trust of a surviving partner is limited by the extent of his obligation; and that it is most important to mark this again and again, for there is not a more fruitful source of error in law than the inaccuracy of language. The application to a man who is improperly, and by metaphor only, called a trustee, of all the consequences which would follow if he were a trustee by express declaration,—in other words, a complete trustee, holding the property exclusively for the benefit of the *cestui que trust*,—well illustrates the remark of Lord Macclesfield, that nothing in law is so apt to mislead as "metaphor."

But conceding that a surviving partner is a trustee in a general sense, what is the extent of his trust? Certainly not beyond his obligation,—1. To collect all the assets of the firm; 2. To apply them to the firm's debts; 3. To distribute the surplus, if any, among the surviving partners and the representatives of those who are dead. This is the full extent and duty of his trust, such as it is. In paying the

debts of the firm there is no limitation or restriction on his power to pay one social creditor, or to secure one, in preference to another, if he act honestly. In this regard he has the same right and power that any other debtor has. The representative of the deceased partner is not injured by a preference given to one firm's creditor over another; and it is quite immaterial to him, if the assets of the firm being insufficient to pay all the social creditors, whether they be applied ratably to all the debts, or be applied to some, to the exclusion of the others. The burden upon the estate of the decedents is precisely the same in either event. The creditor has no other equity than the partners have *inter se*, and the whole extent of a partner's equity is, that the partnership assets shall be applied to the payment of the partnership debts, to the exclusion of the separate debts of the several partners; but this right or equity does not extend or operate to the prevention of giving preference among partnership creditors. The case of *Offutt v. Scott*, 47 Ala. 104, cited in the petition for appeal, is not in conflict with this principle. Nor is the Virginia case of *Lindsey v. Corkery*, 29 Gratt. 650. In that case each of the partners had gone into bankruptcy, and it was, among other things, held that, by the bankruptcy, the going into bankruptcy of the several partners, the social assets stood appropriated to all the social creditors alike, and the rule of administration of the assets thus appropriated was the same, whether the bankrupt assets were administered in the bankrupt court or in a court of equity. The lien or equitable right existing among the partners, by, through, and under which the social creditors may only claim, extends no further than to require the social assets to be applied to the social debts, and until they are paid, that the individual debts of the partners shall be excluded from participation in the social fund; but it does not prohibit preferences from being given in the payment, or securing the payment, of partnership debts out of partnership property. In the absence of a statute to the contrary, — and there is none such in Virginia, — every debtor has the right to prefer one of his creditors to another; and the case of a surviving partner who is a debtor as such is no exception to the general rule.

We do not think it was error in the circuit court of Bedford County to dismiss the bill, when there was no proof of its allegations, nor to refuse to order the needless costs and delay of accounts, when the trustee had reported that the assets were

all in hand, and were insufficient to satisfy even the preferred debts.

The judgment of this court is, that the decree appealed from is right, and that it is affirmed.

ASSIGNMENT FOR BENEFIT OF CREDITORS — PARTNERSHIP. — A sole surviving partner can make a general assignment of the firm property for the benefit of creditors: *Shattuck v. Chandler*, 40 Kan. 516; 10 Am. St. Rep. 227. An assignment of partnership property does not become invalid, where certain creditors are preferred: *Nye v. Van Husan*, 6 Mich. 329; 74 Am. Dec. 690; unless it is so made by statute: *Blair v. Black*, 31 S. C. 346; 17 Am. St. Rep. 30, and note.

WESTERN UNION TELEGRAPH CO. v. WILLIAMS

[86 VIRGINIA, 696.]

HIGHWAYS. — THE PUBLIC ACQUIRES A MERK RIGHT OF PASSAGE OVER A HIGHWAY. The freehold, and all profits of the soil, belong still to the proprietor from whom the right of passage was acquired, and he may make any use of his lands not inconsistent with the enjoyment of such right of passage.

HIGHWAYS. — PRESUMPTION RESPECTING OWNERSHIP OF THE LAND over which a highway runs is, that the adjacent proprietors each own to the middle of such highway; or if the same person owns on both sides, that the whole road belongs to him, subject to the public easement of the right of passage in either case.

STATUTES, CONSTRUCTION OF. — EVERY STATUTE SHOULD RECEIVE A REASONABLE CONSTRUCTION, and such, if possible, as to avoid repugnancy to the constitution. Hence an act authorizing a telegraph company to construct lines and fixtures along a county road, provided the ordinary use of the road is not obstructed, and not expressly declaring that this may be done without compensation, will not be considered as an attempt to deprive owners of such compensation as is guaranteed to them by the constitution of the state.

HIGHWAYS — ADDITIONAL SERVITUDE. — THE ERECTION OF A TELEGRAPH LINE upon a highway is an additional servitude, for which compensation must be made to the owner of the fee, and the legislature has no power to authorize the imposition of such servitude, except on condition that due compensation shall be made therefor to the owner of the lands covered by such highway.

Staples and Munford, and Robert Stiles, for the plaintiff in error.

Pollard and Sands, R. T. Lacy, and W. W. Gordon, for the defendant in error.

LACY, J. This is a writ of error to a judgment of the circuit court of New Kent County, rendered on the thirtieth day of October, 1888. The plaintiff in error constructed its tele-

graph line upon the county road in New Kent County, where the said road ran over the lands of the defendant in error, without his consent, and without condemnation proceedings, and without tendering compensation, and refusing to pay compensation therefor; as is alleged in the declaration, "against the will of the plaintiff, and violently, against the protest of the plaintiff, entered upon the said lands, and cut down and destroyed the trees and underwood,—fifty pine trees, twenty oak trees, and other trees, of the value of \$1,950,—and broke down and prostrated a great part of the fences of the said plaintiff, and dug holes in the land of the plaintiff, and put posts there, and kept the same there, etc., and encumbered the lands, and hindered the plaintiff in the free use and enjoyment thereof." The defendant pleaded not guilty, and moved the court to remove the case to the federal court, which motion to remove the case the court overruled, and the case proceeded to a trial; and upon the trial, the jury rendered a verdict in favor of the plaintiff for the sum of \$550, upon which judgment was rendered accordingly. Whereupon the defendant, the plaintiff in error here, applied for and obtained a writ of error to this court.

There were sundry exceptions taken at the trial, which were assigned as error here. The first assignment which we will consider is as to the refusal of the court to give to the jury certain instructions asked by the defendant, and the giving, by the court, of certain other instructions. The plaintiff moved the court to instruct the jury to the following effect: That "if the jury believe from the evidence that the defendant was, at the time of the committing of the alleged trespass in the declaration mentioned, and still is, a telegraph company chartered by this or any other state, and that the road along which it has constructed and maintained and still is maintaining its telegraph line in the county of New Kent was at said time and still is a county road, then the said defendant had, at said time, and still has, the right to construct and maintain its said line along said county road, upon any part thereof, to the width or extent of thirty feet (whether the road-bed actually used by the public was and is of such width or not), provided the ordinary use of said road be not thereby obstructed, and said defendant had at said time and still has the right to cut down and trim out such trees or limbs, within such width or extent of thirty feet, as might interfere with the proper and effective construction, maintenance, and operation

of its said line. 2. For the exercise of such right as aforesaid the defendant is not required to obtain permission from or to make compensation to the owner or owners of the land upon which said road is located (whether the fee-simple title to the soil upon which the road is located, or the mere easement thereon, be vested in the public). 3. The jury are further instructed that although the road-bed of said road actually used by the public may not be or have been of the width of thirty feet, and although the overseer of said road may not have complied with the law in keeping said road clear and smooth and free from obstructions to the legally required width of thirty feet, yet, under the laws and statutes of the commonwealth, the defendant company was authorized to use any part of said legal road of thirty feet, to the same extent as if said overseer had strictly complied with the provisions of law requiring him to keep said road clear of timber and other obstructions to the required width, and the whole thirty feet been actually used by the public as a road."

But the court refused to give these instructions of the defendant, and gave the following: —

"1. The court instructs the jury that the law presumes that the ownership of lands along the side of a public road in Virginia extends to the middle of said road, and the burden of proof is upon the party who claims otherwise to show that such is not the case along the road when the right is controverted, and the owner has the exclusive right to the soil, subject to its use for the purposes of the public, and to the right of passage of the public over the same; and being owners of the soil, they have a right to all of the ordinary remedies for disturbing of or injury to their freehold or possession, and any act of the legislature which divests such owners of their rights is unconstitutional and void.

"2. The fact that a road is a public road, or highway, does not authorize the digging of holes for the purpose of erecting telegraph-posts, and the erecting of posts, and the establishing a telegraph line over the land of a person without his consent, although the same may be erected or done on that part of his premises which is used as a public road."

It thus appears that the claim of the defendant is, that by reason of the act of assembly of February 10, 1880 (Acts 1879-80, pp. 53, 54), it was authorized to construct its telegraph poles and lines along the lands over which the county road runs without making compensation therefor, and that it main-

tains its right to exercise, as to these lands, the right of eminent domain therein, take and enjoy what belongs to another, in the exercise of the sovereign power, not only without making any compensation therefor, but without any formal proceedings looking to condemnation of this property, under any of the forms of law whatever.

If it is once conceded, or anywise established, that the land in question belonged to the plaintiff, it was his private property, his freehold, as entirely his own, throughout all its parts, as the shelter which he had erected around and over his hearth-stone, for his habitation and home, and as entirely under the protection of the laws against the intrusion as the very hearth-stone itself. That these lands are the lands of the plaintiff, unless he has lost them by the creation of a public road across them, is undeniable, is indeed not denied. Does the creation of a public road through the lands divest him of the fee in the same?

As to the extent of the right acquired by the public upon opening a highway in Virginia, Mr. Minor, in his *Institutes*, vol. 1, p. 120, says: "The public acquires merely a right of passage; the freehold, and all the profits of the soil (that is, trees, mines, etc.), belong still to the proprietor from whom the right of passage was acquired; he may therefore recover the freehold in ejectment, subject to the right of way, and may maintain an action of trespass for digging the ground. If it be unknown from which of two adjacent proprietors a highway was at first taken, or if the highway be the boundary between them, they are understood to own, each *ad medium fium viz*"; citing *Bac. Abr.*, tit. Highways, b; *Bolling v. Mayor of Petersburg*, 3 Rand. 563; *Home v. Richards*, 4 Call, 441; 2 Am. Dec. 574; *Harris v. Elliott*, 10 Pet. 25. And this subject is again referred to by Mr. Minor, in his second volume, page 20, as to the ownership of land adjacent to highways, when he says: "The ownership usually extends to the middle of the road, as in the case of a private stream; or if the same party owns on both sides, the whole road belongs to him, subject to the public easement of the right of passage in either case"; citing 3 Kent's Com. 432. In the case of *Home v. Richards*, 4 Call, 441, 2 Am. Dec. 574, all the judges delivered opinions, and all held that the grant of a right of way does not convey the soil, but only the right to a way over. In the case of *Bolling v. Mayor of Petersburg*, 3 Rand. 563, a case fully and ably argued in this court by the foremost lawyers of that day, Judge Carr

delivered the unanimous opinion of the court. Speaking as to the public highway, he said: "Does this disable the demandant from recovering the land? It certainly would not in England, as many cases show"; citing *Lade v. Shepherd*, 2 Strange, 1004. In that case, the defendant rested one end of a bridge upon the highway. Upon trespass brought, the court said: "It is certainly a dedication to the public, so far as the public has occasion for it, which is only for a right of passage; but it never was understood to transfer the absolute property in the soil." In *Goodtitle v. Alker*, 1 Burr. 143, in ejectment, a special verdict finding that the land was a public street and public highway, Lord Mansfield says: "1 Rolle's Abridgment, 392, is express that the king has nothing but the passage for himself and his people; but the freehold and all the profits belong to the owner of the soil. So do all the trees upon it, and mines under it. The owner may get his soil discharged of this servitude, or easement of a way over it, by a writ of *ad quod damnum*. It is like the property in a market or fair. There is no reason why he should not have a right to all remedies for the freehold, subject still, indeed, to the servitude or easement. An action of trespass would lie for an injury done to it. I see no reason why the owner may not bring ejectment as well as trespass": 1 Willes, 107; 6 East, 154. But it is said that in this country we act on a more liberal scale; that the court will look to the great principles of public policy, and give them effect; that the conveniences of the community requiring highways, they must be had; and as a mere right of way is not sufficient for the full enjoyment of them, we must consider the commonwealth as vested with a base fee in all public highways.

Our business is with the law as it is; and where the power to be exercised is one of so important a character as the taking away the property of the citizen, divesting him of his eminent domain in the soil, I could not consent to take the step unless I saw myself justified by some clear principle of the common law or some plain enactment of the statute. The English cases are pretty strong evidence that the common law confers no such power. I have looked into our statutes, and I can find nothing there to countenance the idea that where a road is established, the fee in the soil, either simple or base, is vested in the commonwealth. On the contrary, I think it is obvious that a right of way is all that the public requires, leaving the whole fee in the owner of the soil. It is

for this use of the land by the commonwealth that the owner is compensated. There can be no question as to what the law is in this state; it is well settled. In *Warwick v. Mayo*, 15 Gratt. 528, Judge Allen delivered the unanimous opinion of this court to the same effect. Speaking of a highway, he says: "The easement comprehends no interest in the soil," and cites Judge Swift as saying, in *Peck v. Smith*, 1 Conn. 103, 6 Am. Dec. 216: "The right of freehold is not touched by establishing a highway, but continues in the original owner of the land in the same manner as it was before the highway was established, subject to the easement. He says further: "Notwithstanding the easement, the owner retains many and valuable interests. . . . He may make any use of it not inconsistent with the enjoyment of the easement": Hare and Wallace's notes to *Dovaston v. Payne*, 2 Smith's Lead. Cas. 90, where the authorities are collected. After speaking of the English rule and the decisions of some of the states, he says: "In Virginia, the rule has been established by an authoritative decision upon the very point in accordance with the doctrine of the English courts," and refers to *Bolling v. Mayor of Petersburg*, 3 Rand. 563. If these principles are thus settled in Virginia, as they certainly are, they are equally as firmly imbedded in the jurisprudence of numerous other states of this country. These are collected and cited by Mr. Angell, in his work on highways, page 396, sections 301 et seq., and notes. At page 398, section 303, this author says: "The principles of the common law, in this respect, have been recognized and adopted by the American courts"; citing *Perley v. Chandler*, 6 Mass. 454; 4 Am. Dec. 159. Under these principles, the plaintiff was entitled to maintain trespass against the defendant, when the said defendant stopped upon his land, instead of passing along, and dug up his soil, and cut down his trees, and tore down and scattered his fence, unless such taking of his property was by due process of law for public uses, upon just compensation. If the use for which the land was taken was a private use, it could not be lawfully taken without his consent. But the use may be conceded to be a public use, and yet to take without just compensation was unlawful; such taking, without authority of law, was a trespass, and such taking could find no justification in any act of the general assembly: Const. Va., art. 5, sec. 14. It is claimed that the act of assembly passed February 10, 1880 (Acts 1879-80), authorized this company to so construct its works

upon the land of the plaintiff. That act should receive a reasonable construction, and be so construed, if possible, as to avoid repugnance to the constitution. And while by that act these companies are authorized to construct their lines and fixtures along the county roads, provided the ordinary use of the road was not obstructed, it is not expressly provided that this may be done without compensation; but the provision is so as not to obstruct the ordinary use. The commonwealth had and has in these roads nothing but the use, — to pass over and along; and the act provides that this use shall not be obstructed by virtue of that act. But at the conclusion of this paragraph, constituting the last words in it, are these words: "upon making just compensation therefor"; and then follow the provisions of the law, which provide for the proceedings necessary to ascertain what is just compensation, by condemnation proceedings. This was certainly the provision of the act as to lands of persons generally, and if the land upon which the highway runs is the private property of the citizen, which it clearly is, should not this language be held to apply to such land as well as to others? Why not? The commonwealth has no more power to grant the one than the other. To grant either is to take private property, and this can only be done upon just compensation. If this is the true construction of this act, the same is in accordance with the constitution of the state; and the plaintiff was entitled to maintain his suit against a corporation which neither took lawfully nor paid a just compensation. But if the act does provide for the taking of this private property without compensation, then it is void for repugnancy to the constitution of the state, and the plaintiff was entitled to recover, and the instruction of the court was right.

However, it is claimed by the plaintiff in error that, granting that the rights of the plaintiff are what we have stated, and the commonwealth has only the right to use by going over, still his case is good, because his works are only a use of the easement, and constitutes no new taking, — no additional servitude. We will now briefly consider this argument.

The right in the commonwealth is to use by going along over; this is the extent of the right. If the right was granted to the defendant to go over simply to carry its messages, then the right granted was in existence before the grant, and the right to go over is not only not disputed, but distinctly admitted. This is the servitude over the land fixed upon it by law,

and the whole extent of it. If anything more is taken it is an additional servitude, and is a taking of the property within the meaning of the constitution. To take the whole subject, the land in fee, is a taking. This, however, is the meaning of the term only in a limited sense, and in the narrowest sense of the word. The constitutional provision which declares that property shall not be taken for public use without just compensation was intended to establish this principle beyond legislative control, and it is not necessary that property should be absolutely taken, in the sense of completely taking, to bring a case within the protection of the constitution. As was said by a learned justice of the supreme court of the United States: "It would be a curious and unsatisfactory result if in construing a provision of constitutional law always understood to have been adopted for protection and security to the rights of the individual as against the government, and which has received the commendation of jurists, statesmen, and commentators as placing the just principles of the common law on that subject beyond the power of ordinary legislation to change or control them, it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public, it can destroy its value entirely; can inflict irreparable and permanent injury to any extent; can, in effect, subject it to total destruction without making any compensation, because in the narrowest sense of that word it is not taken for public use. Such a construction would pervert the constitutional provision into a restriction upon the rights of the citizen, as those rights stood at the common law, instead of the government, and make it an authority for invasion of private rights under the pretext of the public good, which had no warrant in the law and practice of our ancestors": Justice Miller in *Pumpelly v. Green Bay Co.*, 13 Wall. 166.

It is obvious, and it is so held in many cases, that the construction of a railroad upon a highway is an additional servitude upon the land, for which the owner is entitled to additional compensation: *Cooley's Constitutional Limitations*, 548; *Ford v. Chicago etc. R. R. Co.*, 14 Wis. 616; 80 Am. Dec. 791; *Pomeroy v. Milwaukee etc. R. R. Co.*, 16 Wis. 640. And the power of the legislature to authorize a railroad to be constructed on a common highway is denied, upon the ground that the original appropriation permitted the taking for the purposes of a common highway, and no other. The

principle is the same when the land is taken for any other purpose distinct from the original purpose, and the reasoning in the two cases is applicable to each. In the case of *Im-lay v. Union Branch R. R. Co.*, 26 Conn. 255, 68 Am. Dec. 392, it is said: "When land is condemned for a special purpose on the score of public utility, the sequestration is limited to that particular use. Land taken for a highway is not thereby converted into a common. As the property is not taken, but the use only, the right of the public is limited to the use, the specific use, for which the proprietor has been divested of a complete dominion over his own estate. These are propositions which are no longer open to discussion": *Nicholson v. New York etc. R. R. Co.*, 22 Conn. 85; 56 Am. Dec. 390; *South Carolina R. R. Co. v. Steiner*, 44 Ga. 546. In the case of a telephone company, the chancellor, in the case of *Broome v. New York and New Jersey Telephone Co.*, 49 N. J. L. 624, held that, in order to justify a telephone company in setting up poles in the highway, it must show that it has acquired the right to do so, either by consent or condemnation from the owner of the soil, saying: "The complainant seeks relief against an invasion of his proprietary right to his land. The defendant, a telephone company, without any leave or license from or consent by him, but, on the other hand, against his protest and remonstrance, and in disregard of his warning and express prohibition, and without condemnation, or any steps to that end, set up its poles upon his land." What has been said is sufficient of itself to establish the right of the complainants to relief; for in order to justify the defendant in setting up the poles, it is necessary for it to show that it has acquired the right to do so, either by consent or condemnation from the owner of the soil. As to these rights of the owner of the soil, see 9 Am. & Eng. Ency. of Law, tit. Highways, vii., sec. 2; *Board of Trade Tel. Co. v. Barnett*, 107 Ill. 508; 47 Am. Rep. 453; *Southwestern R. R. Co. v. Southern etc. Tel. Co.*, 46 Ga. 43; 12 Am. Rep. 585; *Western Union Tel. Co. v. Rich*, 19 Kan. 517; 27 Am. Rep. 159; *Willis v. Erie Tel. etc. Co.*, 37 Minn. 347.

That the erection of a telegraph line upon a highway is an additional servitude is clear from the authorities. That it is such is equally clear upon principle, in the light of the Virginia cases cited above. If the right acquired by the commonwealth in the condemnation of a highway is only the right to pass along over the highway for the public, then, if the untaken

parts of the land are his private property, to dig up the soil is to dig up his soil; to cut down the trees is to cut down his trees; to destroy the fences is to destroy his fences; to erect any structure, to affix any pole or post in and upon his land, is to take possession of his land; and all these interfere with his free and unrestricted use of his property. If the commonwealth took this without just compensation, it would be a violation of the constitution. The commonwealth cannot constitutionally grant it to another.

It is true that the use of the telegraph company is a public use; that company is a public corporation, as to which the public has rights which the law will enforce. But these public rights can only be obtained by paying for them. The use, while in one sense public, it is not for the public generally; it is for the private profit of the corporation. It is its business enterprise, engaged in for gain. Its services can only be obtained upon their being paid for. There is no reason, either in law or common justice, why it should not pay for what it needs in the prosecution of its business. Upon this burden being placed upon it, it can complain of no hardship; it is the common lot of all. If the said company has use for the private property of a citizen of this commonwealth, and it is of advantage to it to have the same, it is illogical to argue that the property is of small value to the plaintiff, and in the aggregate a great matter to the plaintiff in error. This argument is not worth considering; it cuts at the very root of the rights of property. It would apply with equal force to all the transactions of life. It is sufficient to say, the *axis* of the constitution is over this as over all other private property rights, and there is no power which can divest it without just compensation.

We think the instructions of the circuit court were clearly right, and there is no error therein.

There is no error in the process in the case. It was made as provided by law, against a non-resident corporation having no officer or agent resident in the county.

There was no error in the refusal of the court to remove the case from New Kent County. Not the slightest ground is shown for it. And it may be remarked that the plaintiff in error selected its forum when it thus unlawfully invaded the property rights of one of the citizens of that county.

As to the contention concerning the summoning of the jury by the sheriff, because he was interested in the suit, there is no

error in that action of the court below,—1. Because the sheriff does not appear to be in any way interested in the suit; and 2. Because the sheriff did not in fact select the jury. Upon objection made, the judge made out the list, and gave it to the deputy sheriff to summon the required venire.

Upon the whole case, we are of opinion that there is no error in the judgment appealed from, and the same must be affirmed.

FROM THE FOREGOING OPINION Judge Lewis dissented. In the first place, he was of the opinion that the amount of damages awarded was greatly in excess of the value of the plaintiff's property. The assessed value of the fee of the plaintiff's land abutting on the highway was only \$175, while the damages awarded for injuries resulting from the construction of a line of telegraph poles was \$1,950. This, to the judge's mind, indicated an unreasonable disparity between the value of land for the purposes of taxation and its value for telegraph purposes.

In the next place, the judge combated the doctrine that the only right which the public has in a public highway is a mere right of passage over it, in the manner contemplated when it was first constructed. He insisted that the highway might be devoted to other uses and purposes of the same general nature and public utility, and thus be made to answer such further uses and necessities as might be suggested by new inventions; and in support of these views, he relied upon *Pierce on Railroads*, 233; *Chase v. Sutton Mfg. Co.*, 4 Cush. 152; *Peddicord v. Baltimore etc. R. R. Co.*, 34 Md. 463; *Commonwealth v. Temple*, 14 Gray, 69; *Attorney-General v. Metropolitan R. R. Co.*, 125 Mass. 515; 28 Am. Rep. 264; *Smith v. City Council*, 33 Oratt. 208; 36 Am. Rep. 788; *Kehrer v. Richmond*, 81 Va. 745; *Pierce v. Drew*, 136 Mass. 75; 49 Am. Rep. 7; *Julia Building Ass'n v. Bell Telephone Co.*, 88 Mo. 258; 57 Am. Rep. 393.

COMPARE the case of *O'Neal v. City of Sherman*, 77 Tex. 182, ante, p. 743, in which it is stated that "the rule that land taken by the public for a certain use cannot be appropriated to another use, to the detriment of the owner, affords the only adequate protection of a citizen's constitutional right to be compensated for the condemnation or use of his property for the public benefit." The public acquires an easement merely in highways,—a right to use the road for the purpose of passing and repassing; *Stinson v. Gardiner*, 42 Me. 248; 66 Am. Dec. 231, and note; *State v. Buckner*, Phill. (N. C.) 559; 98 Am. Dec. 83; and the fee remains in the owners of the lands through which the highways run: *Williams v. New York C. R. R. Co.*, 16 N. Y. 97; 69 Am. Dec. 661. For a discussion as to whether a telegraph line is an additional servitude for which the owner of the fee of a highway must be compensated, see note to *Pierce v. Drew*, 49 Am. Rep. 14-19; compare note to *Julia Building Ass'n v. Bell Telephone Co.*, 57 Am. Rep. 409-412.

MILLER'S ADMINISTRATOR v. POTTERFIELD.

(86 VIRGINIA, 376.)

WILL, CONSTRUCTION OF. — A LIFE ESTATE ONLY, and not an estate in fee, is given to a widow by the following clause in her husband's will: "I give and bequeath to my beloved wife all my property, both real and personal, to have and to hold the same for her own use and benefit, and also to make such disposition of the same that she, in her judgment, may deem best, should it become necessary that a part or all should become necessary for the support of herself and W. G., who I desire should remain with her during her lifetime, and have such care and attention given him as he may need. After the death of my wife, I will and devise that any and all property remaining unused shall be given to said W. G., to have and to use for his own benefit, or to make such disposition of as may be deemed best for his interests."

IN CONSTRUING A WILL, we may, in addition to the words, look to the surrounding circumstances; as, for example, the situation of the parties, the ties which connect the testator with the objects of his bounty, and the motives which appeared to influence him in disposing of his property.

WILL, CONSTRUCTION OF. — A GIFT OF WHAT REMAINS UNDISPOSED OF may often be repugnant to the first gift, or too nearly so to vest a certain right; nevertheless, a gift is good of what shall remain at the death of the first taker, if the latter has only a life estate given, or if such gift is preceded by a power of disposition so restrained in its exercise that a gift of what is left evidently refers to what shall remain unappropriated and unappointed under the power.

WILLS, CONSTRUCTION OF. — WHENEVER A POWER OF DISPOSAL ACCOMPANIES a bequest or devise of a life estate, whether such estate be given expressly or by implication, the power is limited to such disposition as a tenant for life can make, unless there are other words clearly indicating that a larger power was intended.

Edward Nichols, and W. W. and B. T. Crump, for the appellants.

Foster and Nelson, for the appellees.

LEWIS, P. This suit was begun in the circuit court of Loudoun County by the administrator of Elizabeth Miller, deceased, for a construction of the will of Frederick Miller, the deceased husband of the plaintiff's intestate, and to have the estate administered under the direction and supervision of the court.

Frederick Miller died in the county of Loudoun in the year 1877, seised and possessed of a house and lot containing about one and a half acres of land, situate near the village of Lovettsville, in that county, and a small amount of personalty. His will, which was duly admitted to probate, bears date July 8, 1876, and contain the following clause:—

"I give and bequeath to my beloved wife, Elizabeth Miller,

all my property, both real and personal, to have and to hold the same for her own use and benefit, and also to make such disposition of the same that she, in her judgment, may deem best, should it become necessary that a part or all should become necessary for the support of herself and William Garrett, who I desire should remain with her during her lifetime, and have such care and attention given him as he may need. After the death of said Elizabeth Miller, I will and devise that any and all property remaining unused shall be given to said William Garrett, to have and to use for his own benefit, or to make such disposition of as may be deemed best for his interests."

The question to be determined is, whether, under this clause of the will, Elizabeth Miller, who survived her husband, took a fee-simple in the real estate, and an absolute title to the personally, as the circuit court held, or whether she took a life estate only. The latter view is, we think, the correct one.

In support of the decree, the appellees rely upon the case of *May v. Joynes*, 20 Gratt. 692, and other familiar cases in this court of that class, beginning with *Shermer v. Shermer*, 1 Wash. 266, 1 Am. Dec. 460, and coming down to *Cole v. Cole*, 79 Va. 251. But, without meaning to question the authority of those cases, we are of opinion they do not apply, and that the present case must be governed by its own circumstances. In each of those cases an absolute power of disposal was given to the first taker, which necessarily, according to a well-settled and undisputed rule of law, rendered the limitation over repugnant and void. Thus in *May v. Joynes*, 20 Gratt. 692, the testator gave the estate to his wife for life, but "with full power to make sale of any part thereof, and to convey absolute titles to the purchasers, and use the purchase-money for investment, or any purpose that she pleases, with only this restriction, that whatever remains at her death shall" be divided, etc. It was held that these words manifested a clear intent to give to the wife an absolute control over the estate, and consequently enlarged the life estate into an absolute estate. But no such power is given by the will under consideration in this case, and hence there is an obvious distinction between this case and the cases just referred to.

The will, as is by no means uncommon in cases of wills, is inartificially drawn; but, taking the whole of it together, it shows very clearly the intention of the testator. Like as was said by Judge Carr of the will construed in *Madden v. Madden*,

2 Leigh, 377, "there are no technical words or forms of expression in it. It is evidently the production of a plain man, who, though he understood very well what he meant to say, and was able to express himself quite intelligently, knew nothing of legal forms or phrases. To ascertain his meaning, we must not look to treatises on wills or to adjudged cases, but to the words he has used."

In addition to the words, however, we may look to the surrounding circumstances; as, for example, the situation of the parties, the ties which connected the testator with the objects of his bounty, and the motives which probably influenced him in disposing of his property: *Colton v. Colton*, 127 U. S. 300; *Hatcher v. Hatcher*, 80 Va. 169. And if we construe the will before us in this light, the intention of the testator, which has not inaptly been termed "the polar star of construction," becomes too plain to be misunderstood.

As appears from the record, the testator died at an advanced age, leaving an aged widow, but no child or descendant. William Garrett was a person of weak mind, about forty years of age, and, as the will discloses, was an object of the testator's anxious solicitude. In his early infancy he had been taken by the testator and his wife, and reared in their family; and they not only furnished him with a home and supplied his moderate wants, but they bestowed upon him, as the evidence shows, parental care and affection as well. Although weak in mind, he was strong in body, and capable of doing hard manual labor. He worked the garden, cut wood, cultivated the lot, and did much other work about the house, such as cooking, washing, etc., and was occasionally employed as a farm-hand in the neighborhood. In this way, independently of his services at home, he earned from fifty to seventy-five dollars a year, which was received by the testator in his lifetime, and after his death by the widow. In fact, he was for years "the main support" of the family, as he unquestionably was of the widow until her death.

It does not appear that the testator had any relatives of his own, or that there was any motive or reason on his part for wishing his property, under any circumstances, to go to his wife's relations. If the latter ever rendered any service or showed any attention to the aged couple, the record does not disclose the fact. It does show, however, that the old people "would have gone to the poor-house" but for the help of Garrett, as their income from other sources was altogether inade-

quate for their maintenance and support. What, then, more natural than that the testator, in disposing of his property, should have selected as an object of his bounty the unfortunate, faithful, and well-beloved Garrett? Indeed, the dictates of humanity and justice alike required that he should; and we think he has effectually done so. The estate, however, was too small to be divided, so he left a life estate to the wife and a remainder to Garrett, making provision, also, for the latter during the lifetime of the former, and thus in all respects seeming to have been influenced by motives which may very reasonably be supposed to have operated with him.

At all events, his intention is too clearly manifested to be mistaken. The language of the will is: "I give and bequeath to my beloved wife all my property, both real and personal, to have and to hold the same for her own use and benefit." Now, if the testator had stopped here, the widow, undoubtedly, would have taken an absolute estate. But the will proceeds as follows: "And also to make such disposition of the same that she, in her judgment, may deem best, should it become necessary that a part or all should become necessary for the support of herself and William Garrett, who I desire should remain with her during her lifetime, and have such care and attention given him as he may need." This language restrains and qualifies that which precedes it, and confines, as it was obviously intended to confine, the power of disposal to the single case mentioned; that is to say, it was intended the widow should have the use of the property for life, but the power to dispose of it she was not to have, unless a sale, in her judgment, should become necessary for the support of herself and Garrett. In that event, and in that event only, was she authorized to dispose of the *corpus* of the estate. And this is made even more plain by that which follows, namely: "After the death of said Elizabeth Miller, I will and devise that any and all property remaining unused shall be given to said William Garrett, to have and to use for his own benefit," etc.

It is contended, however, that the words "all property remaining unused," in the last-quoted sentence, import absolute ownership, and there is no doubt that the same or similar words in other wills have been so construed. But, as already remarked, we are not to be governed by adjudged cases in construing this will, but by the intention of the testator; for it is that which gives the law of the case, if it be not inconsistent

with any rule of law. Indeed, it had been seriously questioned by eminent judges whether, in the construction of wills, adjudged cases do not oftener mislead than correctly guide the judicial expositor in arriving at the testator's intention. But be that as it may, they should never be allowed to disappoint the intention, if effect can be given to it.

As we have seen, there are no technical words or phrases in the will before us; and besides, to use the language of Mr. Justice Miller, in *Clarke v. Boorman's Ex'rs*, 18 Wall. 493, "of all legal instruments, wills are the most inartificial, the least to be governed in their construction by the settled use of technical legal terms, the will itself being often the production of persons not only ignorant of law, but of the correct use of the language in which it is written."

The principle applicable here is well stated in a recent work on wills, as follows: "The gift of what remains undisposed of may often be repugnant to the first gift, or too nearly so to vest a certain right; nevertheless, a gift is good of what shall remain at the death of the first taker, if the latter has only a life estate given him, or if such gift is preceded by a power of disposition so restrained in its exercise that the gift of what is left refers evidently to what shall remain unappropriated and unappointed under the power": Schouler on Wills, sec. 592. See also Keyes on Chattels, sec. 170 (quoted with approval in *Randolph v. Wright*, 81 Va. 608); *Hood v. Haden*, 82 Va. 588.

This principle is illustrated by the case of *Smith v. Bell*, 6 Pet. 68. In that case, there was a bequest to the testator's wife, "to and for her own use and benefit and disposal absolutely," remainder at her death to the testator's son; and it was held that the bequest to the son cut down the interest of the wife to a life estate. The subject was very fully considered by Chief Justice Marshall, in delivering the opinion of the court, and it was held that although the power of disposal given the wife was in terms absolute, yet that, taking the whole will together, and construing it in the light of the surrounding circumstances, the meaning evidently was, such disposal as a tenant for life may make. In the course of the opinion, referring to the force of adjudged cases, the chief justice said: "The construction put upon words in one will has been supposed to furnish a rule for construing the same words in other wills, and thereby to furnish some settled and fixed rules of construction which ought to be respected. We

cannot say that this principle ought to be totally disregarded, but it should never be carried so far as to defeat the plain intent, if that intent may be carried into execution without violating the rules of law."

It has been supposed that that case lays down a different doctrine from that established by the decisions of this court and analogous cases elsewhere, and accordingly its authority, as was said in *Cole v. Cole*, 79 Va. 251, has been questioned, as the cases there cited show. But upon a careful examination of the case, it will be found, we think, that there is really no such conflict between the cases as has been supposed; and the case has been unqualifiedly reaffirmed by the supreme court of the United States in subsequent cases.

Thus in *Brant v. Virginia Coal and Iron Co.*, 93 U. S. 326, a testator devised and bequeathed to his wife all his estate, "to have and to hold during her life, and to do with as she sees proper before her death"; and it was held that she took a life estate, with only such power of disposal as a tenant for life can have. "The language used," said the court, "admits of no other conclusion; and the accompanying words. 'to do with as she sees proper before her death,' only conferred power to deal with the property in such manner as she might choose, consistently with that estate, and perhaps without liability for waste committed."

So in *Giles v. Little*, 104 U. S. 291, a testator provided in his will as follows: "To my beloved wife I give and bequeath all my estate, real and personal, of which I may die seised, the same to remain and be hers, with full power to dispose of the same as to her shall seem proper, so long as she shall remain my widow; upon the express condition that if she shall marry again, then it is my will that all of the estate herein bequeathed, or whatever may remain, shall go to my surviving children." The widow conveyed the real estate, and afterwards married; and it was held, upon the authority of *Smith v. Bell*, 6 Pet. 68, and *Brant v. Virginia Coal and Iron Co.*, 93 U. S. 376, that the estate of the purchaser determined on her marriage. "To hold otherwise," it was said, "would be to suppose that the testator, in draughting his will, was governed by abstruse rules of law in regard to the effect of his expressions, of which, it is probable, he never heard, and had not the slightest conception."

The case of *Morford v. Dieffenbacker*, 54 Mich. 593, was decided upon the same principle. In that case a testatrix de-

vised certain real estate to her mother for life, with power, in case the property should prove insufficient for her support, to dispose of so much of it as might be necessary for that purpose, and then provided that whatever might remain at her death should go over to a cousin. It was contended that the mother took a fee; but the court, speaking by Cooley, C. J., held otherwise, saying she took a life estate only, with a conditional power of sale.

A still stronger case is *Bibbens v. Potter*, 10 Ch. Div. 733, decided in 1879. In that case the testatrix devised all her estate to a sister, "for her own use and benefit absolutely," and afterwards, by a codicil to her will, which she directed to be taken as a part thereof, said: "After the death of my sister, I give and bequeath all property of mine which may then be remaining to my brother"; and it was held by the vice-chancellor that the effect of the codicil was to cut down the gift to the sister to a life estate.

Numerous other cases to the same effect might be cited. They all show, as was said in the Brant case, that where a power of disposal accompanies a bequest or devise of a life estate, whether such estate be given expressly or by implication, the power is limited to such disposition as a tenant for life can make, unless there are other words clearly indicating that a larger power was intended: See *Bradley v. Westcott*, 13 Ves. 445; *Smith v. Snow*, 123 Mass. 323; *Minot v. Prescott*, 14 Mass. 496; *Boyd v. Strahan*, 36 Ill. 355; *Terry v. Wiggins*, 47 N. Y. 512; *Walker v. Pritchard*, 121 Ill. 221; *Madden v. Madden*, 2 Leigh, 377; *Johns v. Johns*, 86 Va. 333.

As this view of the subject is decisive of the case, no other question need be considered. The decree must therefore be reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

WILLS, CONSTRUCTION OF. — In the construction of wills, the courts may take into consideration the surrounding circumstances under which the testator makes his will, as well as the condition of his property and family: *Elliott v. Elliott*, 117 Ind. 380; 10 Am. St. Rep. 54, and note. Effect of a devise to a wife and daughter, the property not to be disposed of, but to be kept for their heirs: *Carpenter v. Van Olinder*, 127 Ill. 42; 11 Am. St. Rep. 92, and note 99 et seq.

FUGATE v. MOORE.

[86 VIRGINIA, 194A.]

CONFLICT OF LAWS. — A GRANT OF ADMINISTRATION has generally no operation outside of the state from whose jurisdiction it was derived. Hence, ordinarily, no suit can be maintained by or against any executor or administrator in his official capacity in the courts of another state from that in which he was appointed.

CONFLICT OF LAWS — FOREIGN EXECUTOR, SUIT AGAINST. — One appointed executor in another state, but who resides in this state, and who has collected assets in the state where he was appointed, which he has not brought into this state, cannot be sued here for the purpose of recovering a legacy to which the complainant claims to be entitled under the will of the defendant's testator.

Duncan and Sewell, for the appellant.

A. L. Pridemore, for the appellees.

LEWIS, P. The testator, at his death, in 1880, was domiciled in Tennessee, and there the will was proved, and the executor qualified. No administration upon the estate has ever been granted in Virginia. The legacy sued for is claimed under the second clause of the will, which is as follows: —

"2. I give and bequeath to Martha J. Combs, daughter of Virginia A. Combs, deceased, five hundred dollars out of the G. B. Short debt, when collected and put at interest, including the amount due her in my hands from the estate of Virginia A. Combs, deceased; and if the above Martha J. Combs should die, leaving no heirs of her body, the said amount to be divided equally between my heirs."

The bill alleges that the complainant Moore, after the testator's death, intermarried with the said Martha, since deceased, and had issue by her, who survived her about three months, leaving the complainant its sole distributee; that both the complainant and the defendant, the executor, reside in Lee County, in this state; that the Short debt "was owing" in that county; that the same has been "collected by the said executor," and that the money remains undisbursed in his hands. The object of the bill, therefore, as averred, is "to enforce said trust, and to compel the defendant to pay said legacy."

There was a demurrer to the bill, on the ground, — 1. Of want of jurisdiction, inasmuch as the bill shows on its face that the defendant has never been appointed or qualified as the personal representative of the testator in this state, but in Tennessee only, where the testator was domiciled; and 2. Be-

cause the complainant, not being the personal representative, either of his deceased wife or of their deceased infant child, had no right to sue.

The defendant also answered the bill, denying, among other things, that the Short debt was payable in this state, and averring that Short, the debtor, resided in Hancock County, in Tennessee, and that the debt had there been collected.

Afterwards an amended bill was filed, in which it was charged that the Short debt was secured by a lien on certain real estate in Tennessee, which had been sold to enforce the lien; that at the sale the defendant purchased the land for a sum sufficient to pay the debt, and now owes the purchase-money. To this the defendant answered that he had not bought the land for himself individually, but for the estate, and that he owed nothing on account thereof. He admitted, however, that the debt had been collected. He also demurred to the amended bill. Afterwards, Reese D. Flanary, administrator of the deceased wife, and also of her deceased child, was, by consent, made a party plaintiff to the suit, and when the cause came on to be heard, a decree was entered, directing the legacy to be paid to him, which is the decree appealed from.

It does not appear from the record what disposition was made of the demurrers to the original and amended bills, but as the decree adjudicates the principles of the cause, we must assume that they were overruled: *Matthews v. Jenkins*, 80 Va. 463.

A number of questions were discussed in the argument at the bar, of which one of the principal was, whether the legacy is a vested or contingent one; but in the view we take of the case, it will not be necessary to pass upon that question. We think the objection to the jurisdiction must be sustained, and, therefore, that the case must go off on that ground.

It is an established general rule that a grant of administration has no legal operation outside of the state from whose jurisdiction it was derived. Hence, ordinarily, no suit can be maintained by any executor or administrator, or against any executor or administrator, in his official capacity, in the courts of any other state: *Story on Conflict of Laws*, 7th ed., sec 513; 1 Barb. Ch. 158; *Andrews v. Ivory*, 14 Gratt. 229, 73 Am. Dec. 355; *Harvey v. Richards*, 1 Mason, 881. If, however, an executor or administrator should go into another state, and there, without taking out new letters of administration, should

collect debts or other assets of his decedent found there, he would be liable to be sued in the courts of that country by any creditor there, and held liable to the extent of the assets so collected. And in *Tunstall v. Pollard*, 11 Leigh, 1, it was decided that an executor who has qualified and received assets in a foreign country, and has brought them into this state, is liable to be sued and to be compelled to account here, although he has never qualified here, and although he may have received no assets here.

The present case, however, is not within the principle of that decision, for here no assets have been collected in this state, nor have any been brought hither by the defendant. The charge in the amended bill that the land upon which the Short debt was secured was purchased by the defendant, and that he now owes the purchase-money out of which the legacy is payable, is denied in the answer, and the agreed statement of facts in the record, upon which the case was decided, is in conformity with the averments of the answer on that point. According to those averments, the land was purchased by the executor, not for himself, but for the estate, and it is neither alleged nor proven that under the laws of Tennessee the purchase for the estate was not a valid one. It is admitted, however, that the debt has been collected, so that the case stands upon the same footing as if the land had been sold to a stranger for cash. The fact that the executor resides in this state does not affect the case. He is none the less a foreign executor on that account. The testator at his death was an inhabitant of Tennessee; the executor qualified there; administration has never been granted here; and no assets of the testator are, or at any time have been, in this state, and that is decisive of the case, so far as the question of jurisdiction is concerned.

The jurisdiction is sought to be maintained on the ground of a personal trust in the executor, which, it is insisted, may be enforced in the courts of this state, and *Governor v. Williams*, 3 Ired. 152, 38 Am. Dec. 712, cited in 1 Rob. (Va.) 179, is relied upon. In that case, it is true, Chief Justice Ruffin expressed the opinion that an administrator may be compelled to account in a court of equity, where he may be found, to those entitled to the estate, wherever it may be situate, on the ground of a personal trust, no matter where it may have been assumed. But the remark was purely *obiter* (the case being an action at law, and consequently no such question being before the court),

and is therefore not authority even in the courts of North Carolina.

The doctrine is strongly combated by Mr. Justice Story in his treatise on the conflict of laws, section 514, where numerous authorities are cited, including *Doolittle v. Lewis*, 7 Johns. Ch. 45, 11 Am. Dec. 389, in which case Chancellor Kent said: "It is well settled that a party cannot sue or defend in our courts, as executor or administrator, under the authority of a foreign court of probate. Our courts take no notice of a foreign administration, and before we can recognize the personal representative of the deceased in his representative character, he must be clothed with authority derived from our law. Administration only extends to the assets of the intestate within the state where it was granted. If it were otherwise, the assets might be drawn out of the state, to the great inconvenience of domestic creditors, and be distributed perhaps on very different terms, according to the laws of another jurisdiction." See also *Vaughan v. Northup*, 15 Pet. 1; 1 Lomax on Executors, 142.

This doctrine, it is true, has been modified in Virginia to the extent of holding, as we have seen, that where a foreign executor comes into this state, bringing assets with him, he may be sued here. But that, as we have also seen, does not affect the present case, nor are we aware of any principle upon which the unqualified doctrine enunciated by Chief Justice Ruffin, and contended for here, can be supported.

The decree must therefore be reversed, and the bill dismissed for want of jurisdiction.

FOREIGN EXECUTORS OR ADMINISTRATORS. — As to actions by or against foreign executors or administrators, see *Johnson v. Wallis*, 112 N. Y. 230; 8 Am. St. Rep. 742, and note. In *Durie v. Blauvelt*, 49 N. J. L. 114, it was decided that in New Jersey foreign administrators could not be sued in their representative capacity.

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AGENCY.

1. WHILE AGENCY CANNOT BE PRESUMED from the fact that one assumes to do some act in that character, yet where the fact of agency is established, the power which the agent actually exercises in his principal's business, and over other employees to which they constantly yield obedience, may be looked to as evidence of the actual power possessed by the agent. *International etc. Ry Co. v. Prince*, 795.
2. DECLARATIONS OF ALLEGED AGENT are not admissible to establish the agency. *Pepper v. Cairns*, 625.
3. DOUBLE AGENCY — WHO MUST LOSE BY HIS EMBEZZLEMENT. — If a person acts as agent for a borrower in negotiating a mortgage loan and in receiving, handling, and applying the money, and for the lender in passing upon the sufficiency of the security and in delivering the executed mortgage, and he, after receiving the money, embezzles it, the borrower is liable for the mortgage debt, although the check for the amount of the loan was drawn upon the delivery of the mortgage, to the order of such agent. *Id.*

4. **AGENT'S ACTS, HOW FAR BINDING.** — As to third persons, the principal is bound by the acts or representations of his agent, made or done within the apparent scope of his authority; and his actual instructions do not govern unless the person dealing with him had notice or was put upon inquiry as to his real authority. *Wachler v. Phoenix Assur. Co.*, 600.
- See **BANKS AND BANKING**, 1, 4; **CARRIERS**, 3; **CONTRACTS**, 1; **CORPORATIONS**, 12-17; **EXECUTION**, 1; **HUSBAND AND WIFE**; **INSURANCE**; **MASTER AND SERVANT**; **MUNICIPAL CORPORATIONS**, 12-14.

ALTERATION OF INSTRUMENTS.

1. **ALTERATION OF NEGOTIABLE PAPER, BURDEN OF EXPLAINING, ON HOLDER WHEN.** — Where the sizing and a portion of the paper on which a check is written have been removed in that part of the paper where the amount is written and the words written on the rubbed or scraped part of the paper are cramped and crowded so as to fit the same space, these facts are sufficient to impose the burden of explaining them upon the holder of the check, although it does not appear that such words were written over any particular amount previously written on such space. Where there is apparent evidence of the alteration of a negotiable instrument in the place where the amount or the date should be written, the complete obliteration of all traces of the words of the genuine instrument does not shift the burden of proof from the party offering the instrument in evidence to the party alleging the alteration. And the application of this rule is not affected by the fact that both parties to the transaction are dead. *Estate of Nagle*, 669.
2. **PRESUMPTION AS TO ERASURES ON NEGOTIABLE INSTRUMENTS.** — In the absence of evidence, the maker of a negotiable instrument is presumed to have issued it free from all blemishes, erasures, and alterations, and the burden of showing that it was defective when issued is upon the holder. The presumption of law in favor of innocence does not extend to the alteration of negotiable instruments. *Id.*

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APPEAL AND ERROR.

1. **ERROR WITHOUT INJURY** is not ground for complaint. *Frost v. Welch*, 761.
2. **JUDGMENT WILL NOT BE REVERSED FOR ERRORS** committed at the instance or in favor of the party seeking the reversal. *Borden v. Crook*, 23.
3. **REVIEWING EVIDENCE.** — The supreme court may examine the evidence for the purpose of deciding as to the correctness of instructions, or

whether or not there was any evidence tending to support a material element in the cause of action or defense; but it cannot examine evidence to determine whether the lower court found correctly as to the facts in issue, respecting which the evidence was conflicting, nor can it examine the opinion of that court to ascertain what the facts were found to be. *Postal Tel. Cable Co. v. Lathrop*, 55.

6. **POWER TO CHANGE FINDINGS OF FACT.** — The appellate court must adopt the findings of fact of the trial court, and cannot change or modify them in any respect in matters purely legal in their nature, as on motions to vacate orders of arrest or attachments, or to set aside judgments for mistake, inadvertence, excusable neglect, or the like. *Taylor v. Pope*, 530.
8. **FINDINGS OF FACT—PRESUMPTION.** — It is always presumed that the trial court prepared its own findings; and if, upon a careful consideration of the evidence, a judge found the facts to be the same as did his predecessor on a former occasion in the same matter, the mere fact that he adopted his predecessor's findings is not a ground for exception *Id.*
9. **REFUSAL TO GRANT NONSUIT** cannot be assigned as error. *Kelly v. Bennett*, 594.
7. **REFUSAL TO GIVE SEVERAL INSTRUCTIONS** cannot be joined in one assignment of error. *Id.*
8. **A GENERAL OBJECTION TO THE ADMISSION IN EVIDENCE** of an answer to a question propounded a witness raises no question for consideration in the appellate court. An objection to evidence that it is improper, incompetent, irrelevant, and immaterial is without effect for any purpose. The precise grounds of objection must be definitely stated. *Cincinnati etc. R'y Co. v. Howard*, 96.
9. **IN ABSENCE OF EXCEPTIONS TO CHARGES**, they will not be reviewed on appeal, in a case of misdemeanor. *Cole v. State*, 856.
10. **TRIAL, CHANGE OF PLACE OF.** — If one of the assignments of error is, that the court erred in not changing the place of trial in a criminal prosecution, the appellate court will look not only to the evidence before the trial court when its ruling was made, but also to all the subsequent proceedings down to the conclusion of the trial; and if it appears therefrom that the accused had a fair and impartial trial, his conviction will not be set aside. *Cheatham v. State*, 310.
11. **IF COUNSEL FOR PROSECUTION REFERS TO FACTS NOT IN EVIDENCE**, and on objection being made by defendant's counsel, the trial court instructs the jury to disregard such reference, and the counsel who made it at the same time declares that he made the point inadvertently, and asks the jury to ignore it, a verdict of conviction subsequently returned in the case will not be set aside because of the improper remark of counsel for the state. *Id.*

See CRIMINAL LAW, 6-12; DEEDS, 5.

APPROPRIATION.

See EMINENT DOMAIN; WATERCOURSES, 2.

ASSAULT.

1. **DAMAGES.** — **THE PREJUDICIARY CONDITION OF BOTH THE PLAINTIFF AND DEFENDANT** may be taken into consideration by the jury in estimating

the damages which should be awarded the former for an assault committed on him by the latter, and an instruction to the jury to that effect is not erroneous. *Birmingham v. Earhart*, 319.

2. **EVIDENCE TO MITIGATE DAMAGES.** — IN AN ACTION TO RECOVER COMPENSATION FOR PERSONAL INJURIES inflicted on the plaintiff by the defendant, the latter may show, in mitigation of damages, the provocation under which he acted, though it was not received at nor immediately preceding the time of the assault. Hence a defendant of whom compensation is sought, for a murderous assault upon plaintiff, may give in evidence in mitigation a defamatory article written and published by the plaintiff more than twenty-four hours prior to such assault. *Ward v. White*, 883.
3. **NEW TRIAL.** — THE AMOUNT OF DAMAGES RECOVERABLE IN ACTIONS FOR PERSONAL TORTS must be left to the discretion of the jury, and the court will not grant a new trial on the ground of the damages allowed being trivial or excessive, unless the verdict shocks the understanding and impresses the court with the conviction that it resulted from passion or prejudice. Therefore, though the plaintiff had been shot and dangerously injured by the defendant, and for many months languished of wounds which were then believed to be mortal, and the verdict of the jury gave him only \$1,375 damages, the court declined to interfere. *Id.*
See CRIMINAL LAW, 13, 14.

ASSIGNMENT.

1. **UNEARNED PAY** of a retired officer of the United States army is not assignable. An assignment thereof is against public policy and void. *Schaeck v. Wyckoff*, 438.
2. **ASSIGNMENT VOID AS AGAINST PUBLIC POLICY.** — AN ASSIGNMENT BY A SHERIFF OF SUCH FEES as he may become entitled to receive from the state or county for public services thereafter to be rendered is invalid, because against public policy. *Bowery National Bank v. Wilson*, 507.
See INSURANCE, 6; JUDGMENTS, 7.

ASSIGNMENT FOR BENEFIT OF CREDITORS.

- SURVIVING PARTNERS MAY MAKE AN ASSIGNMENT OF THE FIRM PROPERTY FOR THE BENEFIT OF ITS CREDITORS, AND MAY GIVE A PREFERENCE TO ONE CREDITOR OR SET OF CREDITORS, TO THE SAME EXTENT THAT ALL OF THE PARTNERS COULD, WERE ALL STILL LIVING.** *Patton v. Leitch*, 902.

ATTACHMENT AND GARNISHMENT.

1. **GARNISHMENT OF NON-RESIDENT.** — A resident indebted to a non-resident may be garnished in the courts of the state of the former's residence, and judgment there legally rendered against him that will bind the fund in his hands, although his non-resident creditor was cited to appear only by publication. Payment by the garnishee under such judgment is conclusive against such creditor. *Berry v. Davis*, 748.
2. **GARNISHMENT OF EXEMPT WAGES.** — A garnishee who is indebted to a defendant, for wages which by law are exempt from execution, is not protected by a judgment against him, when he fails to state in his answer the facts which show the exemption, and when the debtor has not been formally cited to appear, and has not voluntarily appeared for the purpose of maintaining his right. *Missouri P. Ry Co. v. Whipaker*, 724.

3. **GARNISHMENT OF EXEMPT WAGES—NOTICE.** — A debtor is not considered to have constructive notice of a garnishment proceeding to subject his exempt wages to the payment of a claim, and in such case it is the proper practice for the garnishee, after disclosing the facts which show the exemption, to have the debtor cited, to the end that he may make his own defense. *Id.*
4. **EXEMPTIONS.** — A RESIDENT OF ONE state who performs labor in such state for a railway company having its residence in another state, but doing business in both states, in each of which wages are exempt, may maintain an action to recover his wages in the state of his residence, although, prior to the commencement of such action, garnishment proceedings against such company, instituted by the creditor of such employee, were pending in the other state, and he has been served with summons by publication. *Missouri P. R'y Co. v. Sharitt*, 143.
5. **GARNISHEE WHO HAS PAID A JUDGMENT** rendered against him is liable to his creditor for interest on the remainder of the debt, from the date of the judgment in garnishment. *Berry v. Davis*, 748.
6. **GARNISHEE WHO PERMITS COSTS** to accumulate upon judgment against him cannot charge his creditor with such costs. *Id.*

ATTEMPT TO COMMIT CRIME.

See CRIMINAL LAW, 15-17, 33-36.

ATTORNEY AND CLIENT.

See APPEAL AND ERROR, 11; CRIMINAL LAW, 4, 5; JUDGMENTS, 31.

BAILMENTS.

See PERSONAL PROPERTY.

BALLOTS.

See ELECTIONS.

BANKS AND BANKING.

1. **COLLECTING BANK LIABLE FOR DEFAULT OF ITS CORRESPONDENT.** — A bank with which a customer leaves, for collection, his draft upon a party residing at a distant point is liable for the failure and default of a correspondent to whom it forwarded the draft for collection. *Streisguth v. National German-American Bank*, 213.
2. **PROOF OF OWNERSHIP OF DEPOSIT.** — Money deposited in bank by one person may be shown to belong to another, either by the latter or his attaching creditor; but in the absence of any claim by the real owner, the bank cannot dispute the title of the depositor, and is bound to honor his check. *Hemphill v. Yerkes*, 607.
3. **CHECKS—EFFECT OF ASSIGNMENT OF.** — A check drawn against the whole of a specific fund deposited in bank in the name of the drawer, but the equitable title to which is in the payee, transfers to him the legal title also, even as against the drawer, and the indorsement and delivery of the check by such payee to his assignee for a valuable consideration vests the legal title to the deposit in the latter as against subsequent attaching creditors of the original payee and assignor. *Id.*
4. **CORPORATION ACTING FOR A PARTY WHOSE NAME IS NOT DISCLOSED** must be regarded as acting for itself, and its act or contract treated as

invalid if it would have been invalid had it professed to act for itself. Hence if a savings bank having no power to deal in the purchase and sale of cotton for future delivery gives orders to a commission merchant to purchase for such delivery, stating that it is acting for good and responsible customers, but not disclosing their names, and the merchant, in response to such order, purchases such cotton, he cannot recover of the bank either his commissions or his losses sustained by the purchase, where no cotton has been delivered to the bank, and the purchase was made in the name of the merchant. *Jamison v. Citizens' Sav. Bank*, 482.

8. SAVINGS BANKS — CONTRACTS ULTRA VIRES. — Speculative contracts entered into for the sale and purchase of stocks by a savings bank at the stock board, or elsewhere, subject to the hazard or contingencies of gain or loss, are *ultra vires*, and a perversion of the powers conferred by its charter. *Id.*

BENEFICIARIES.

See INSURANCE.

BENEVOLENT SOCIETIES.

See INSURANCE, 28-32.

BILLS OF LADING.

See CARRIERS, 1.

BONA FIDE PURCHASERS.

PURCHASER BONA FIDE, WHO IS NOT. — One is not entitled to protection as an innocent purchaser from the fact that he did not participate in a fraud, if he knew that it was being or had been committed. Having this knowledge, he was bound to inquire what were the rights of the party against whom the fraud was practiced. *Lang Syne Mfg. Co. v. Ross*, 337.

See JUDGMENTS, 23; NEGLIGENCE, 13-15.

BONDS.

1. BOND SIGNED BY PART OF SURETIES NAMED IN IT BINDS THOSE WHO SIGN WHEN. — Where part only of the sureties named in a bond execute it, those who do execute it will be bound, unless they sign it upon condition that they are not to be bound unless the other sureties named therein also sign it. *Whitaker v. Richards*, 684.
 2. BOND PREPARED FOR TWO PARTNERS, BUT SIGNED BY ONE ONLY, BINDS HIM WHEN. — Where a bond is prepared for two partners, but is signed by one only, with the expectation, but not upon the condition, that it will be signed by the other, the partner who signs will be bound. *Id.*
- See EVIDENCE, 1-4; MECHANIC'S LIEN, 5; OFFICE AND OFFICERS, 2-4.

BROKERS.

See CONTRACTS, 1.

BURDEN OF PROOF.

See ALTERATION OF INSTRUMENTS, 1; ELECTIONS, 23; FRAUDULENT CONVEYANCES, 4; NEGOTIABLE INSTRUMENTS, 9; RAILROAD COMPANIES, 18.

BURGLARY.

See CRIMINAL LAW, 18-21.

CANCELLATION.

See SALES, 6, 7; WILLS, 1, 2.

CARRIERS.

1. **COMMON CARRIER CANNOT RELIEVE HIMSELF FROM LIABILITY FOR ACTUAL VALUE OF GOODS LOST THROUGH HIS NEGLIGENCE**, by a stipulation in a bill of lading that "when a valuation as agreed upon shall be named upon this shipping receipt, it is distinctly understood that such valuation shall cover loss or damages from any cause whatever." *Weiler v. Pennsylvania R. R. Co.*, 700.
2. **BURDEN OF PROOF.** — If a CARRIER DELIVERS GOODS IN A DAMAGED CONDITION which started on their journey over connecting lines in good condition, it must exculpate itself from liability by showing that the injury done occurred without its fault. *Mobile etc. R. R. Co. v. Tupelo Furniture Mfg. Co.*, 262.
3. **CONNECTING CARRIERS — LIABILITY FOR ACT OF AGENT ACTING FOR BOTH.** — When connecting carriers use one station and jointly employ a ticket-agent, the fact that he sells a ticket for transportation over one of the roads does not render the other road liable for the safe transportation of the passenger over the road on which he bought the ticket. *Atchison etc. R. R. Co. v. Cochran*, 129.
4. **DUTY TO SUNDAY TRAVELERS.** — A railroad company, having accepted a passenger, is under obligation to take due and reasonable care for his safety, and such obligation arises by implication of law, independent of contract. Therefore a passenger traveling on Sunday, in violation of law, is not precluded from recovering for an injury arising from the carrier's negligence, when such violation of law was merely a condition and not a contributory cause of the injury. In such case the passenger need not rely on the contract, which was illegal. *Delaware etc. R. R. Co. v. Trautwein*, 412.
5. **DUTY TO PROVIDE SAFE MEANS OF ACCESS TO AND FROM DEPOT.** — The duty of a railroad company as a carrier of passengers does not end when the passenger is safely carried to the place of his destination. The company must also provide safe means of access to and from its station for his use. He has the right to assume that the means of access provided are reasonably safe. If there are two ways, one of which is faulty in construction and repair, and it has been recognized and assented to by the company as a means for the entrance and exit of passengers, an unwarned passenger using it, and injured by its faulty condition, is entitled to recover, although the other way, which he might have used, was safer. It is entirely immaterial who built or maintained the defective way. *Id.*
6. **DUTY TO TRESPASSER.** — A common carrier of passengers is not under the same obligation as to care and diligence in guarding against injuries to strangers, and especially to trespassers, as it is in guarding against injuries to passengers. The duty to the latter involves the use of the utmost care and diligence which can be bestowed by human skill and foresight, and is enforced by the highest considerations of public policy. The duty to the former rests merely upon grounds of general humanity. AM. ST. REP., VOL. XIX. — 60

- and respect for the rights of others, and requires the carrier to perform the transportation service so as to not wantonly or carelessly be an aggressor toward third persons, whether such persons are on or off the vehicle. *Chicago etc. R. R. Co. v. Mehlback*, 17.
7. A TRESPASSER UPON A RAILROAD TRAIN attempting to obtain a free ride without the consent of the carrier cannot recover for an injury received, in the absence of proof of gross negligence amounting to willful or wanton misconduct on the part of such carrier. *Id.*
 8. DUTY TO TRESPASSER — INSTRUCTION. — In an action to recover for personal injury, where the main controversy is as to whether plaintiff, at the time, was a passenger on the train or a mere trespasser, and the evidence on this point is conflicting, an instruction which takes from the jury all consideration of evidence tending to show that plaintiff was attempting to obtain a free ride without the consent of the carrier, and which requires a verdict of guilty upon mere proof that the injury was caused by the negligence alleged, irrespective of whether plaintiff was a passenger or a mere trespasser, although the negligence alleged was such as would render the carrier liable only in case of injury to a passenger, is erroneous. *Id.*
 9. CARRIER OF PASSENGERS — LIABILITY FOR INJURIES TO INTERLOPER. — ONE NOT ACCEPTED AS A PASSENGER, and who is on a train without the knowledge or consent of the company, in a car devoted exclusively to the railway mail service, where he was forbidden by notice to remain, and where the employees, in the discharge of their ordinary duties, would not discover him, though possessed of a ticket entitling him to transportation, is not a passenger, and is not entitled to recover for injuries arising from a collision. *Bricker v. Philadelphia etc. R. R. Co.*, 585.
 10. PASSENGER, DEFINITION OF. — A passenger, in a legal sense, is one who travels in some public conveyance by virtue of a contract, express or implied, with the carrier, as the payment of fare, or that which is accepted as an equivalent therefor. *Id.*
 11. LIABILITY TO PASSENGER. — A carrier, in undertaking to transport passengers safely, undertakes to so carry them only when they place themselves under his direction in particular places prescribed for the purpose. He will not be held liable for damages accruing to an interloper who, unnotified by him, hides in a place not intended for the transportation of passengers. *Id.*
 12. RAILROAD COMPANY MUST EXERCISE ORDINARY AND REASONABLE CARE for the safety of a passenger lawfully on its hand-car. *International etc. R'y Co. v. Prince*, 795.

See NEGLIGENCE, 15.

CHARTERS.

See CORPORATIONS.

CHATTEL MORTGAGES.

1. TENDER OF AMOUNT OF DEBT SECURED BY CHATTEL MORTGAGE AFTER MATURITY, EFFECT OF. — The effect of a tender of the amount of a debt secured by a chattel mortgage, though made after maturity, is to extinguish and discharge the lien of the mortgage; and in an action thereafter brought by the mortgagee to obtain possession of the chattels

mortgaged, it is not necessary to keep the tender good by depositing the money in court. But in such case the proof should be clear that the tender was fairly made, deliberately and intentionally refused by the mortgagee; that sufficient opportunity was afforded to ascertain the amount due, and that a sum sufficient to cover the whole amount due was absolutely and unconditionally tendered. *Moore v. Norman*, 247.

2. **CHATTEL MORTGAGE OF AFTER-ACQUIRED PROPERTY — RULE AT LAW AND IN EQUITY.** — At common law, a mortgage can operate only on property actually in existence at the time of giving the mortgage and actually or potentially belonging to the mortgagor. In equity, however, while the mortgage does not pass the title to after-acquired property, it creates in the mortgagee an equitable interest therein which will prevail even against judgment creditors and others, although the mortgagee has not taken possession of the property, and the mortgagor has done no new act to confirm the mortgage. The mortgage, though inoperative as a conveyance, is operative as an executory agreement, which attaches to the property when acquired, and the beneficial interest is transferred to the mortgagee, the mortgagor being regarded as his trustee, in accordance with the maxim that equity considers that as done which ought to be done. *Borden v. Crook*, 23.

See LANDLORD AND TENANT, 3; SPECIFIC PERFORMANCE, 1.

CHECKS AND DRAFTS.

See BANKS AND BANKING, 2, 3.

CODICILS.

See WILLS.

COMMERCIAL AGENCY.

See NEGLIGENCE, 11; SALES, 8.

COMMON CARRIERS.

See CARRIERS.

COMMON LAW.

THE WHOLE OF THE COMMON LAW OF ENGLAND IS NOT IN FORCE in this state. The intention of our legislature was to adopt only so much of it as was applicable to our condition. The statutes of the several states adopting the common law are generally construed as applying only in cases where that law is applicable to the habits and conditions of society, and in harmony with the genius, spirit, and objects of our institutions. It is contrary to the spirit of the common law itself to apply a rule founded on a particular reason to the law, when the reason utterly fails. *Ross Smelting Works v. Stevenson*, 364.

See WATERCOURSES, 2.

COMMONS.

See HIGHWAYS, 7.

COMPLAINT.

See ELECTIONS, 24; JUDGMENTS, 21.

COMPROMISE.

See INSURANCE, 7.

CONCURRENT NEGLIGENCE.

See NEGLIGENCE, 3; RAILROAD COMPANIES, 12.

CONDEMNATION.

See EMINENT DOMAIN.

CONDITIONAL SALE.

See CONTRACTS, 2.

CONDITIONS.

See INSURANCE.

CONFESSIONS.

See CRIMINAL LAW, 8-11.

CONFLICT OF LAWS.

See EXECUTORS AND ADMINISTRATORS, 1, 2.

CONFUSION OF GOODS.

See PERSONAL PROPERTY.

CONNECTING CARRIERS.

See CARRIERS, 2, 3.

CONNECTING RAILROADS.

See RAILROAD COMPANIES, 4.

CONSIDERATION.

See NEGOTIABLE INSTRUMENTS.

CONSPIRACY.

• See CRIMINAL LAW, 21-23, 41-42.

CONSTITUTIONAL LAW.

See CONTEMPT; CORPORATIONS, 2-4; ELECTIONS, 1-3; MUNICIPAL CORPORATIONS, 5, 6; STATUTES; TAXATION, 2.

CONTEMPT.

1. **CONSTITUTIONAL LAW.** — Courts have power, for the purpose of enforcing their authority during the progress of trials, for the speedy, orderly, and impartial administration of justice between litigants, and the enforcing of final judgments and orders of the court after the trial, to summarily punish for contempt, provided they do not violate constitutional provisions guaranteeing trial by jury. *Peterbaugh v. Smith*, 30.
2. **JURISDICTION TO PUNISH.** — Proceedings by contempt, to enforce the authority of a jurisdiction different from that of the court enforcing it, are

unknown to the common law. The rule is, that the court alone in which the contempt is committed, or whose order or authority is defied, has power to punish it, or to entertain proceedings to that end. *Id.*

3. CONSTITUTIONAL LAW — RIGHT OF TRIAL BY JURY. — A statute authorizing a judge of a circuit court in vacation to punish in a summary manner, by fine and imprisonment, any person who shall refuse to obey a subpoena of a notary public to appear and have his deposition taken or to sign such deposition, is void as being in conflict with constitutional provisions guaranteeing a trial by jury. *Id.*
4. CONSTITUTIONAL LAW. — The legislature has no power to make that punishable as a contempt which, in the nature of things, cannot be a contempt of the authority imposing the punishment. *Id.*

CONTESTS.

See ELECTIONS.

CONTRACTS.

1. MUTUALITY OF OBLIGATION ESSENTIAL TO BINDING CONTRACT. — An instrument signed by an owner of real estate and given to a real estate broker, declaring that in consideration of the latter's agreeing to act as agent for the sale of certain land the former thereby gave to the latter the exclusive right for three months to sell the same, and promised to pay a stated commission for making a sale, is not a contract, because there is no mutuality of obligation, nor any other consideration for the agreement of the party who signed it, and so long as it remained a mere present authorization to sell, without contract obligations having been fixed, it was revocable by the party who signed it at any time before a sale was effected. The mere receiving of this instrument by the party to whom it was given did not import an agreement on his part to so act as agent, nor did the fact that he tried for a month to sell the land fix that obligation upon him; for such acts on his part are referable to the naked present power to sell, and proof of these facts is not sufficient to sustain an averment of a contract entered into. *Stensgaard v. Smith*, 205.
2. CONSTRUCTION OF. — IN DETERMINING THE REAL CHARACTER OF A CONTRACT, courts always look to its purposes rather than to the name given it by the parties, and though the parties denominate it a lease, the court may adjudge it a conditional sale, with a reservation of the title for the purposes of security. *Fidelity etc. Safe Dep. Co. v. Shenandoah etc. R. R. Co.*, 858.
3. CONTRACT BY TELEGRAPH, TIME AS ESSENCE OF. — Where, through telegraphic correspondence, an offer to sell goods is answered with an offer to buy at a certain price, with the condition added, "Must have reply early to-morrow," such condition is a stipulation for a reply within that time; and when it is not received until late in the evening of that day, and in the absence of proof that the condition was complied with, the contract is not complete, and the title will not pass as against an attachment levied on that day before the reply was received. *Union National Bank v. Miller*, 538.
4. DAMAGES FOR NON-PERFORMANCE ON TIME. — One who contracts to complete certain work within a certain time is liable for not completing it within such time, unless prevented by the act or fault of the other party. *Underwood v. Wolf*, 40.

3. **SEVERAL ACTIONS TO RECOVER INSTALLMENTS DUE ON A CONTRACT.** — Each default in the payment of money falling due by a contract, payable in installments, may be the subject of an independent action, provided it is brought before the next installment becomes due; but each action should include every installment due when it is commenced, unless a suit is at the time pending for the recovery thereof, or other special circumstances exist. *Lorillard v. Clyde*, 470.

See **BANKS AND BANKING**, 5; **BONDS**; **CARRIERS**, 4; **CORPORATIONS**, 1, 6-9, 13-15; **DEBTOR AND CREDITOR**, 3; **NEGLIGENCE**, 10; **SALES**.

CONTRACTS AGAINST PUBLIC POLICY.

See **ASSIGNMENT**, 1, 2.

CONTRACTS OF SALE.

See **VENDOR AND VENDEE**.

CONTRIBUTORY NEGLIGENCE.

See **INNKEEPERS**, 1, 2; **MASTER AND SERVANT**; **NEGLIGENCE**; **RAILROAD COMPANIES**, 18.

CONVERSION.

See **PERSONAL PROPERTY**, 3.

CORPORATIONS.

1. **WHAT CONSTITUTES.** — **BOARD OF WATER COMMISSIONERS**, liable as well as competent to be impleaded, to make contracts, hold property, have a seal, make by-laws, and generally "to do all legal acts which may be necessary and proper to carry out the effect, intent, and object of the act" creating it, although not in terms declared to be a corporation, is made such by the powers conferred. *O'Leary v. Board of Commissioners*, 169.
2. **LEGISLATIVE CHARTER IS USUALLY A CONTRACT**; but such charter, when revocable at the will of the grantor, is only a *quasi* contract, and partakes more of the character of a license. To such charter the rule of the Dartmouth College case does not apply. *Wagner Free Institute v. Philadelphia*, 613.
3. **REVOCATION OF CORPORATE CHARTER.** — Under a constitutional provision giving the legislature power to alter or revoke any corporate charter, whenever, in its opinion, the privileges granted become injurious to the citizens of the commonwealth, the legislature is the judge as to when such privileges become injurious. *Id.*
4. **REVOCATION OF CORPORATE CHARTER.** — Under a constitutional provision giving the legislature power to alter or revoke any corporate charter whenever, in its opinion, the privileges granted become injurious to the citizens of the commonwealth, a charter granted to a corporation, exempting its property from taxation, but granted subsequently to the adoption of the constitutional provision, is only a *quasi* contract, in the nature of a license, which the legislature may alter or revoke by general law whenever, in its opinion, such charter becomes injurious. *Id.*
5. **PROMOTERS OF.** — Where a prospectus and subscription agreement state that a corporation is to be formed to purchase mines, that the mines are to be capitalized at one million five hundred thousand dollars, to be

divided into shares of the par value of ten dollars each, to be issued to one of the promoters in payment of the mine; that a portion only of the shares is to be offered for sale at four dollars per share, and that the stock is to be fully paid up and non-assessable, and the promoters subsequently purchased the mine, paying therefor out of the moneys paid by other subscribers, and issued to themselves the balance of the capital stock without paying any consideration therefor, they are liable to an action brought by the other subscribers to recover the damages sustained by them from the issue of said stock, it being conceded that the promoters did not disclose the price that they were to pay for the mine, nor the fact they did not intend to purchase unless sufficient funds were furnished by others to pay therefor and for the expense of the corporation, leaving a large amount of stock to be gratuitously distributed among themselves. *Brewster v. Hatch*, 498.

6. **ULTRA VIRES, DEFENSE OF, WHEN NOT PERMITTED.** — If a corporation has entered into a contract in violation of a directory provision of its charter, and has enjoyed the full benefit of such contract, it cannot plead in defense that it is *ultra vires*, in the absence of proof that fraud was intended or has been committed. *Sherman Center Town Co. v. Morris*, 134.
7. **CONTRACT ULTRA VIRES**, while it remains executory, cannot be enforced; but when it has been executed and the corporation has received the benefit thereof, it is estopped from denying the validity of the contract. *Id.*
8. **RATIFICATION OF CONTRACT ULTRA VIRES.** — When a corporation has had the benefit of a contract executed by its agent in disregard of a mere formality, slight evidence will establish ratification by the corporation, and estop it from denying the validity of the contract. *Id.*
9. **CONTRACTS OF CORPORATIONS ARE ULTRA VIRES** when they involve adventures or undertakings outside and not within the scope of the powers given by their charters. *Jemison v. Citizens' Sav. Bank*, 482.
10. **CORPORATIONS. — PLEA OF ULTRA VIRES SHOULD PREVAIL** unless it will defeat justice or accomplish a legal wrong. *Id.*
11. **ULTRA VIRES — ESTOPPEL.** — Corporation is not estopped from urging that a contract is *ultra vires* and void, if it remains executory, and the corporation has not received the benefit or proceeds thereof, as where the contract is for the purchase of cotton on its account, and such cotton, though purchased for such account, is bought in the name of the other contracting party, and is never delivered to the corporation. *Id.*
12. **CORPORATION, NOTICE OF POWERS OF.** — He who deals with a corporation is chargeable with notice of its powers and the purposes for which it was formed, and when dealing with its agents or officers, is bound to know the extent of their powers and authority. *Id.*
13. **PRESUMPTION THAT OFFICERS HAD POWER TO CONTRACT.** — A contract in due form, and regular upon its face, executed by the president and secretary of a corporation, who are its duly constituted officers, is *prima facie* valid and executed with authority, and those who deny such authority take upon themselves the burden of establishing their claim. *Sherman Center Town Co. v. Srigart*, 137.
14. **POWER OF OFFICERS TO EXECUTE CONTRACTS.** — Express authority by resolution directing the president and secretary to represent the corporation in the execution of contracts is not indispensable to the exercise of that power by these officers. Their authority may be implied from their conduct and the acquiescence of the directors. *Id.*

15. **AUTHORITY OF OFFICERS TO EXECUTE CONTRACTS.** — When the president and secretary of a corporation act openly and publicly as its agents in executing its contracts, with the full knowledge and acquiescence of the directors, the corporation cannot escape liability on a contract so executed, of which it has received the benefit, on the mere ground that the authority was not expressly conferred by resolution entered upon the records of the corporation. *Id.*
 16. **DIRECTORS OF CORPORATION ARE NOT ENTITLED TO ANY COMPENSATION FOR OFFICIAL SERVICES** rendered by them as directors, unless compensation is provided for by the charter or by-laws of the corporation. If, therefore, the charter or by-laws of a private corporation contains no such provision, a director or president of such corporation cannot recover for official services rendered in and about its business, when no agreement for compensation preceded them. No presumption of such an agreement arises from the performance of the services. *Martindale v. Wilson-Cass Co.*, 706.
 17. **AGREEMENT TO PAY FOR OFFICIAL SERVICES OF OFFICER OF CORPORATION, MADE AFTER PERFORMANCE** of the services, will not sustain an action against the corporation to recover therefor. *Id.*
- See **BANKS AND BANKING; FRAUDULENT CONVEYANCES, 3; JUDGMENTS, 20, 30; MUNICIPAL CORPORATIONS; RAILROAD COMPANIES; SUBROGATION; TAXATION, 3, 4.**

CORPUS DELICTI.

See **CRIMINAL LAW, 11, 29.**

COSTS.

See **ATTACHMENT AND GARNISHMENT, 6; TENDER.**

CO-TENANCY.

1. When one of several tenants in common of a farm, all being of full age, occupies it, and takes in the usual course of husbandry the annual profits thereof, without having ousted or denied the rights of his co-tenants, he is not liable to account to them, or to any of them, for the profits so taken. *Le Barron v. Babcock*, 488.
2. **TENANT IN COMMON WHO GROWS AND SEVERES CROPS**, such as oats and grass, while he is in sole possession of the lands of the co-tenancy, becomes the exclusive owner of such crops, where his occupancy has been permissive, and without ousting his co-tenants; and if his co-tenants take such crops away, they become answerable to him for the full value thereof. *Id.*

See **PARTNERSHIP, 2; PERSONAL PROPERTY, 2; REAL PROPERTY, 1.**

CO-TRUSTEES.

See **TRUSTS AND TRUSTEES.**

COUNTIES.

1. **COUNTIES ARE POLITICAL SUBDIVISIONS OF THE STATE**, created by the sovereign power for the exercise of the functions of local government. *Fry v. County of Albemarle*, 879.
2. **AS BETWEEN A COUNTY AND ITS OFFICERS, THE PRINCIPLES OF RESPONSIBLE SUPERIOR** do not apply, because the relation of master and

servant does not exist. Such officers are *quasi* public officers of the state. *Id.*

2. A COUNTY IS NOT ANSWERABLE IN DAMAGES TO A PERSON INJURED BY THE NEGLIGENCE of a convict who is working on a public highway under the direction and supervision of an officer of the county. *Id.*

CRIMINAL LAW.

1. **INDICTMENT—JOINDER OF OFFENSES—DUPLICITY.**—Two or more distinct offenses may be joined in one indictment under separate counts without its being open to the objection of duplicity, which occurs when two or more distinct crimes are joined in one count. *Reagan v. State*, 833.
2. **IDEM SONANS.**—Where the name of an owner of stolen goods is written in an indictment as "Fraude," while the proper spelling of it is "Freude," and expert evidence shows a wide difference in sound in pronouncing the two words, the question of variance or no variance in the names should be submitted to the jury, with proper instructions explanatory of the rules of *idem sonans*. *Weitzel v. State*, 855.
3. **IDEM SONANS.**—When any question arises concerning the name of the person upon whom the indictment alleges that the injury was inflicted, the practice should be analogous to the practice in case of plea of misnomer by the prisoner. The fact should be submitted to the jury, and it is competent to show that the names are entirely dissimilar in sound, or that the prisoner is as well known by the name used in the indictment as by any other. *Id.*
4. **ALLUSION TO DEFENDANT'S FAILURE TO TESTIFY AS GROUND FOR NEW TRIAL.**—A statute providing that "any defendant in a criminal action shall be permitted to testify in his own behalf therein, but the failure of any defendant to so testify shall not be taken as a circumstance against him, nor shall the same be alluded to or commented on by counsel in the cause," absolutely prohibits, under any circumstances, any allusion to as well as any comment to the jury, on defendant's failure to testify in his own behalf. Such comment by counsel is ground for a new trial. *Hunt v. State*, 815.
5. **PRIVILEGE OF PROSECUTION.**—The prosecuting attorney, in a criminal case, may comment upon the fact that the father of the accused, being present during the trial, was not placed upon the stand to testify in favor of the defendant. *Crumes v. State*, 853.
6. **TESTIMONY OF AN ACCOMPLICE.**—The refusal of a trial court to instruct or advise a jury to act with great prudence and suspicion upon the evidence of an accomplice, and to acquit unless it is corroborated in material particulars, will not justify the appellate court in setting aside a verdict and judgment of conviction. Whether such instruction should be given or not rests in the discretion of the trial judge, and his refusal to give it is not assignable as error. *Cheritham v. State*, 310.
7. **EVIDENCE.**—All materials in any way part of the *res gestæ* may be produced as evidence on the trial. *Jackson v. State*, 839.
8. **CONFESSIONS AS EVIDENCE.**—Article 750 of the Code of Criminal Procedure of Texas provides, in relation to confessions, that a confession shall not be used if, at the time it was made, the defendant was in jail, or other place of confinement, or in custody of an officer, unless such confession is made in the voluntary statement of the accused, taken before an examining court in accordance with law, or made volun-

larly after being first cautioned that it may be used against him, or unless in connection with such confession he makes a statement of facts or of circumstances that are found to be true, which conduce to establish his guilt, such as the "finding of secreted or stolen property." Under this provision, the facts stated by the accused must first be found to be true in pursuance of or by means of the information received from him; and if they are first found to be true from any other source of information, the confession is not admissible. If, however, they are first found to be true in pursuance of his statement, and afterwards found to be true from information derived from another source, the confession is admissible. *Crowder v. State*, 811.

9. **CONFESSION IS NOT ADMISSIBLE** unless freely and voluntarily made by the prisoner, uninfluenced by persuasion or compulsion, not induced by any promise creating hope of benefit, or any threats creating fear of punishment, and after caution that it may be used against him. A promise by an officer to a prisoner that if he will confess, "he will do what he can for him in his case," renders the confession obtained thereby inadmissible. *Searcy v. State*, 851.
10. **CONFESSION AS EVIDENCE**. — Where the influence applied to obtain a confession is such as to make the prisoner believe his condition would be better by making it, whether true or false, it is inadmissible; if not, it is admissible. *Id.*
11. **CORPUS DELICTI — CONFESSIONS**. — The *corpus delicti* consists not merely of an objective crime, but also of defendant's agency in the crime; and unless it is proved in both these respects, a confession by the defendant is not of itself enough to sustain a conviction. The confession must be corroborated. This may be done by circumstantial evidence. *Harris v. State*, 837.
12. **ADULTERY OF WIFE — DECLARATIONS OF HUSBAND AS EVIDENCE**. — On the trial of a woman for adultery, evidence that her husband, since deceased, had declared to witness, in the presence of the alleged guilty parties, that he desired witness to remain with him and give him his medicine; that he would take anything he might give him, that he was afraid to trust either of the alleged guilty parties; and that witness did not know what went on there while he, the husband, was alone with them, as they aggravated him all they could, is incompetent, because uncertain, as referring to acts of lewdness showing illicit intercourse, or a disposition to have such intercourse on the part of the alleged guilty parties. Where, however, the admission of such evidence works no injury, it is not ground for reversal. *Graham v. State*, 809.
13. **INDICTMENT FOR ASSAULT WITH INTENT TO ROB** need not describe the property which the defendant intended to take, nor aver that he intended to deprive the owner of the property of the value of it. *Crimes v. State*, 853.
14. **INDICTMENT FOR ASSAULT WITH INTENT TO ROB**. — The only fact which appears from the record as necessary to an understanding of the points decided is, that an officer testified that he obtained the pistol exhibited in evidence, at the house of the father of defendant, about a week after the alleged offense. *Id.*
15. **THE CRIME OF AN ATTEMPT TO COMMIT AN OFFENSE** is compounded of two elements: 1. An intent to commit it; and 2. A direct ineffectual act done towards its commission. It must approach sufficiently near to the crime intended to be committed to stand either as the first or some sub-

sequent step in a direct movement towards the commission of the offense after the preparations are made. *Hicks v. Commonwealth*, 891.

16. **INDICTMENT FOR AN ATTEMPT TO COMMIT A CRIME** must allege some act done by the defendant, of such a nature as to constitute an attempt, in the legal sense, to commit an offense. *Id.*
17. **THE CRIME OF ATTEMPTING TO ADMINISTER POISON IS NOT ESTABLISHED** by proof that the defendant purchased poison, and ineffectually solicited another to put it in the food or drink of a third person. *Id.*
18. **BURGLARY. — POSSESSION OF STOLEN GOODS**, without other evidence of guilt, is not *prima facie* evidence of burglary; but where goods have been taken by a burglar, and are immediately, or soon after, found in the actual and exclusive possession of a person who gives a false account or refuses to give any account of the manner in which the goods came into his possession, proof of such possession and guilty conduct will sustain the inference, not only that he stole the goods, but that he also made use of the means by which access to them was obtained. *Jackson v. State*, 839.
19. **BURGLARY. — Possession of recently stolen property**, to warrant an inference of guilt of burglary, must be personal and exclusive, unexplained, and must involve a distinct and conscious assertion of property by the accused. *Id.*
20. **BURGLARY — RIGHT OF JURY TO INSPECT EVIDENCE OF CRIME. —** Where the evidence concerning the identity of a sack found in the house of the accused, as one of the sacks stolen at the time of the burglary, is conflicting, the jury is entitled to a personal inspection of the sack in the presence of the court, counsel, and parties. In such case the jury is not entitled to an inspection after they retire from the court-room. *Id.*
21. **BURGLARY — EVIDENCE. —** Where a conspiracy between two to commit a burglary is established, evidence of the finding of the fruits of the crime at the house of either of the conspirators subsequent to the burglary, and what transpired at the time, is admissible and legitimate as tending to connect the conspirator on trial with the crime, although neither of them was present when such fruits of the burglary were found. *Id.*
22. **CONSPIRACY EVIDENCE. —** As between conspirators, antecedent acts and declarations of each, pending and in pursuance of the common design, and tending to throw light upon its execution, or upon the motive or intent of the perpetrators, are competent evidence against each and all of them; and when the conspiracy is proved, the declarations and movements of other conspirators before the perpetration of the crime are admissible against the defendant, though occurring in his absence. *Clark v. State*, 817.
23. **CONSPIRACY EVIDENCE. —** When two or more persons combine or associate together for the prosecution of some fraudulent or illegal purpose, the acts and declarations of any of them, made in furtherance of the common purpose, and forming part of the *res gestæ*, are admissible in evidence against the others; otherwise, however, as to subsequent acts, admissions, or declarations. *Id.*
24. **JURY TRIAL. —** On the trial of one accused of murder, it is not error entitling him to a new trial for the court to instruct the jury that they may consider threats against the decedent, and proved to have been made by the accused, and any motive to kill established by the evidence, together with all the evidence in the case. *Cheatham v. State*, 310.

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25. **MANSLAUGHTER. — UNCOMMUNICATED THREATS** are not admissible in evidence to establish manslaughter or to mitigate its punishment. Manslaughter is predicable only upon adequate cause, and facts unknown to defendant cannot enter into and become constituent elements or factors in creating adequate cause. *Levy v. State*, 826.
26. **SELF-DEFENSE — THREATS.** — When defendant provokes the occasion which produces the necessity to take the life of deceased, he cannot rely upon self-defense, nor avail himself of threats made by deceased against his life. *Id.*
27. **MANSLAUGHTER — SELF-DEFENSE.** — Where the only inference deducible from the evidence is, that defendant, after seeking the occasion, killed deceased because of his insulting language toward defendant's mother, he cannot rely upon self-defense, no matter whether or not deceased attempted to draw a weapon, or whether defendant shot to save himself from being killed. In either event the crime would be manslaughter, the defendant having had an intent to commit a felony, and having provoked the occasion which produced the necessity to take the life of deceased. *Id.*
28. **MANSLAUGHTER — ADEQUATE CAUSE FOR KILLING.** — That one man called another a son of a bitch is not such adequate cause for killing him, by the latter, as will reduce the crime to manslaughter, within the meaning of a statutory term, that "insulting words toward a female relative" is "adequate cause" to reduce a killing to manslaughter. *Id.*
29. **CLOTHING AS EVIDENCE.** — Clothing identified as that worn by deceased at the time he was shot is admissible as evidence for the state, although since the shooting it has been given to a party who has had it altered and patches sewed over the bullet-holes therein. *Id.*
30. **INFANTICIDE.** — To warrant the conviction of a mother, of infanticide, it must be proved that the child was born alive, that it had an existence independent of its mother, and that afterwards its life was destroyed by her act, agency, or procurement. *Harris v. State*, 837.
31. **PUBLIC HOUSE, AS DEFINED BY STATUTE,** signifies a house commonly open to the public, either for business, pleasure, religious worship, the gratification of curiosity, or the like, and includes all houses made public by the occupation of them, as taverns, inns, storehouses for retailing liquors, or by the resort of numerous persons, or in any other way. *Cole v. State*, 856.
32. **PUBLIC HOUSE. — SCHOOL-HOUSE** is a public house within the meaning of a statute prohibiting card-playing in such house on Sunday, and the fact that it is not at times temporarily occupied as such, or that it may be so occupied for other than school purposes, does not, when vacant, or occupied for other purposes, make it any the less a public house during the time it is actually dedicated to school purposes as such. A house occupied during the week, for school, is none the less a public house on Sunday, whether occupied at all, or whether used on that day for religious services. *Id.*
33. **ATTEMPT TO RAPE. — INDIOTMENT** charging an attempt to commit rape, by threats alone, is sufficient without especially alleging that the threats were directed against the female upon whom the attempt was made. *Reagan v. State*, 833.
34. **ATTEMPT TO RAPE. — SPECIFIC INTENT** to rape is an absolutely essential ingredient to an attempt to rape, and must accompany the means used to effect the crime. *Id.*

35. **ATTEMPT TO RAPE — DRUNKENNESS DEPRIVING ACCUSED OF INTENT.** — A specific intent to rape must accompany the means used to effect an attempt to rape, and if the prisoner's mental faculties were so overcome by intoxication at the time of the attempt that he was not conscious of what he was doing, or if his actions and the means used were naturally calculated to effect his purpose, still if, from intoxication, he had not sufficient capacity to entertain the intent, such intent cannot be inferred from his acts. If, however, he retained sufficient mental capacity to know what he was doing, and why he was doing it, then the attempt to rape may be inferred from his acts, the same as if he were sober. *Id.*
36. **HUSBAND'S ATTEMPT TO COMMIT RAPE ON HIS WIFE.** — A husband who, under menace of death to both parties in case of refusal, and by presenting a loaded gun at both parties, constrains his wife to submit and a man to undertake an attempted sexual connection, is guilty of an attempt to commit rape. *State v. Dowell*, 568.
37. **ROBBERY IS THE FELONIOUS AND FORCEFUL TAKING**, from the person of another, of goods or money of any value, by violence and putting him in fear; and any instruction which omits the felonious intent from the definition of the crime is erroneous. *Commonwealth v. White*, 628.
38. **ROBBERY. — VALUE OF PROPERTY TAKEN** may be considered by the jury under an indictment for robbery for the purpose of determining the intent with which the act was committed. The taking of a pinch of tobacco, with no felonious intent, but as a practical joke, is not robbery. *Id.*
39. **INSTRUCTION DEFINING ROBBERY** in the exact language of the statute is sufficient and unobjectionable. *Clark v. State*, 817.
40. **INDICTMENT FOR ROBBERY** may charge defendant in the same count with felonious acts with respect to several parties, as the taking of certain personal property from one, and money from another, if it was all one transaction; and if the proof follows the allegations, it will authorize a conviction. *Id.*
41. **ROBBERY — EVIDENCE.** — On a trial for robbery, evidence is admissible to show that subsequently to the commission of the crime, the fruits thereof were found in the possession of one of defendant's co-conspirators, whose complicity in the commission of the robbery has been fully established. *Id.*
42. **ROBBERY — EVIDENCE.** — On a trial for robbery, evidence is admissible that defendant and his co-conspirator, while in custody and at the time of their preliminary examination, informed the witness of the place of concealment of some of the fruits of the crime, and requested and tried to induce him to remove them. *Id.*
43. **OPINION AS EVIDENCE.** — On a trial for robbery, a witness may state as his opinion that tracks made at the place of the robbery correspond with those made by the boots or shoes worn by defendant. *Id.*
44. **OPINION EVIDENCE.** — Witness may state his opinion as to the correspondence of tracks found at and near the place of an attempted robbery, and the shoes worn by defendant, or shoes worn by another, who, on the night of the offense, was seen in company with defendant. *Crimes v. State*, 853.
45. **WITNESS MAY STATE HIS OPINION** that hair found on a fence was from a horse which the evidence shows that defendant was riding at the time of an attempted robbery. *Id.*
46. **EVIDENCE — DECLARATIONS AS HEARSAY.** — Declarations made by the father of the accused when he delivered a pistol to an officer subsequent

to an attempted robbery, about defendant not having had the pistol at the time of the attempt, is hearsay, and not part of the *res gesta*. The father being a competent witness, he must be produced to testify to and establish the fact, if defendant desires such fact established. *Id.*

CROPS.

See CO-TENANCY, 2.

CROSS-EXAMINATION.

See TRIAL, 4.

CROSSINGS.

See RAILROAD COMPANIES, 15-17.

CRUELTY.

See MARRIAGE AND DIVORCE.

CUSTOM.

See USAGE.

DAMAGES.

PLEADINGS — PUNITIVE DAMAGES. — Where the amount of damages is stated, plaintiff may recover punitive damages, though they are not styled such in his complaint. *Southern Exp. Co. v. Brown*, 306.

See ASSAULT, 1-3; CONTRACTS, 4; CORPORATIONS, 5; COUNTIES, 3; EMINENT DOMAIN, 2-9; EVIDENCE, 7; FORCIBLE ENTRY AND UNLAWFUL DETAINER; HIGHWAYS, 4-6; LIBEL AND SLANDER; MASTER AND SERVANT, 2, 5; MORTGAGES, 2, 5; MUNICIPAL CORPORATIONS, 15-19.

DEBTOR AND CREDITOR.

1. **CREDITOR HAS NO RIGHT TO THE PERSONAL LABOR OF HIS DEBTOR**, and therefore cannot complain if such labor is given to another. *Buckley v. Dunn*, 334.

2. **PREFERENCES.** — Every debtor has the right to prefer one of his creditors to another, in the absence of a statute forbidding it, and the case of a surviving partner who is a debtor is no exception to the rule. *Patton v. Leftwich*, 902.

3. **NOVATION.** — **WHETHER A TRANSACTION AMOUNTS TO A NOVATION** or not is a question of intention, to be decided from all the circumstances of the case, although nothing positive be expressed. *Fidelity etc. Safe Dep. Co. v. Shenandoah etc. R. R. Co.*, 858.

See ATTACHMENT AND GARNISHMENT; BANKS AND BANKING, 2, 3; CHATTEL MORTGAGES, 2; ESTOPPEL, 2; FRAUDULENT CONVEYANCES; JUDGMENTS, 2, 3; PAYMENT.

DECLARATIONS.

See AGENCY, 2; CRIMINAL LAW, 12, 44.

DECREEES.

See JUDGMENTS.

DEDICATION.

1. DEDICATION OF STREET, EFFECT OF. — When a street is dedicated to the public, the fee vests only in the public when the statute so provides; in all other cases the owner of the land retains his exclusive right in the soil for every purpose of use or profit not inconsistent with the public easement, and may maintain appropriate actions for any encroachments upon it. *O'Neal v. City of Sherman*, 743.
2. DEDICATION OF STREET — RIGHT TO LIMIT USE. — A grantor may prescribe the conditions, qualifications, and limitations of a grant of property to a municipal corporation, and when the land is granted for "street purposes only," the city cannot appropriate it to another use, or if it does, the use may be enjoined. *Id.*

See HIGHWAYS.

DEEDS.

1. DEED IS INOPERATIVE FOR WANT OF DELIVERY, if after being signed and acknowledged by the grantor, he leaves it in the custody of an agent, with instructions to deliver it to the grantee only in the event of the grantor's death, though, after such death, it is delivered to the grantee by the agent, as directed. *Weininger v. Cock*, 320.
2. ACKNOWLEDGMENT OF A DEED CANNOT BE TAKEN BY A GRANTEE THEREIN, though the conveyance is to him as trustee. *Bowden v. Parrish*, 873.
3. ACCEPTANCE OF A DEED BY A GRANTEE OR TRUSTEE IS PRESUMED from its delivery, unless he renounces it. This presumption is not rebutted by the fact that he, acting as a notary public, took and certified the acknowledgment of the deed. *Id.*
4. DEED MADE TO MARRIED WOMAN in her maiden name is valid if clearly shown to have been intended for her. *Wilkenon v. Schoonmaker*, 803.
5. EVIDENCE. — A COPY OF A CONVEYANCE of land in Texas, made before a notary public in Louisiana in accordance with the form and mode usual in this state, is not admissible in evidence as a recorded instrument, though proved and recorded in the county where the land is situated. The error in admitting it is immaterial, if an examined copy taken from the notary's record, subsequently introduced, was properly admitted. *Frost v. Wolf*, 761.
6. EVIDENCE. — AN EXAMINED COPY of a deed to land in Texas, made before a notary in Louisiana, with proof of the execution of the original and of the names of the parties and payment of the purchase-money, is admissible to prove a conveyance of the land. *Id.*
7. THOUGH AN UNSEALED INSTRUMENT MAY NOT CONVEY the legal title to land, it at least conveys the equitable title. *Id.*
8. DEEDS TO PARTNERSHIP. — Though at law a deed made by or to a partnership in the firm name, the full name of neither partner being given, will not pass title to the land, such is not the rule in equity, where the equitable title is deemed to pass. *Id.*
9. ANCIENT DEED, PRESUMPTION OF POWER OF PARTNER TO CONVEY. — After the lapse of more than thirty years from the time of execution of a deed by one member of a partnership purporting to act for the firm, his power to act will be presumed, and the deed admitted to prove the conveyance. *Id.*
10. CONVEYANCE BY PARTNER. — Where property stands in the name of a firm, one partner in that name may convey the legal as well as the

equitable title, if he has authority so to do at the time the conveyance is made, or his act may be ratified by subsequent parol consent. *Id.*

11. **PRESUMPTION FROM LAPSE OF TIME**, as to power of partner to convey firm property by deed which he assumes the right to make in its name, arises the same as in other cases in which one person has assumed to execute a deed in the name of another. *Id.*
12. **ANCIENT DEED AS EVIDENCE**. — Where an ancient deed, otherwise admissible, is offered in evidence, it is immaterial that its proof or acknowledgment was insufficient to admit it to record. *Id.*
13. **JUDGMENT CREDITOR NOT CHARGED WITH NOTICE OF UNRECORDED DEED FROM JUDGMENT DEBTOR**. — A judgment creditor is not charged with notice that the judgment debtor, who is the lessor of real estate, the title to which appears of record in his name at the time of the docking of the judgment, has conveyed the property to another person, although the latter has informed the tenant that he has a deed from the debtor. The law in such case holds the judgment creditor to have had notice only of such facts as inquiry would naturally lead to, not of such facts as it might possibly lead to. *Wilkins v. Bevier*, 238.

See **FRAUDULENT CONVEYANCES**, 8; **JUDGMENTS**, 4; **JUDICIAL SALES**.

DEFINITIONS.

- "Children." See **WILLS**, 3, 4.
- "General insurance agent." See **INSURANCE**, 10.
- "Legal heirs." See **INSURANCE**, 32.
- "Nuisance." See **NUISANCES**, 4.
- "Passenger." See **CARRIERS**, 10.
- "Peddler." See **PEDDLERS**.
- "Public house." See **CRIMINAL LAW**, 31, 32.

DELIVERY.

See **DEED**, 1.

DEPOSITIONS.

1. **DEPOSITION AS EVIDENCE**. — The deposition of a deceased witness, certified by the officer taking it as being correct, and afterwards identified by him, is admissible in evidence, and no objection can be raised to the form of the officer's certificate when no particular form is prescribed by statute. *Clark v. State*, 817.
2. **DEPOSITION. — OBJECTION** to the manner and form of taking a deposition must be made at the time the deposition was taken. Such objection cannot be made for the first time at the trial. *International etc. Ry Co. v. Prince*, 795.

DEPOSITS.

See **BANKS AND BANKING**, 2.

DEPOTS.

See **CARRIERS**, 5.

DESERTION.

See **MARRIAGE AND DIVORCE**.

DEVISES.

See **WILLS.**

DISORDERLY HOUSES.

See **MUNICIPAL CORPORATIONS, 8-10.**

DIVERSION.

See **WATERCOURSES.**

DIVORCE.

See **LES FEMMES; MARRIAGE AND DIVORCE.**

DOCUMENTARY EVIDENCE.

See **EVIDENCE, 1-5.**

DOMICILE.

See **ELECTIONS, 4-8.**

DOUBLE AGENCY.

See **AGENCY, 2.**

DUPLICITY.

See **CRIMINAL LAW, 1.**

DRAINAGE.

See **WATERCOURSES.**

DRUMMERS.

See **INNKEEPERS, 5-12.**

DRUNKENNESS.

See **CRIMINAL LAW, 25; MARRIAGE AND DIVORCE, 7, 8.**

EASEMENTS.

See **HIGHWAYS, 1-3.**

ELECTIONS.

1. **QUALIFICATIONS OF A VOTER, PRESCRIBED BY THE CONSTITUTION** of a state, cannot be abridged, extended, or changed by the legislature. *State v. Findley, 346.*
2. **STATUTE DECLARING THAT NO MORMON, OR MEMBER of the Church of Jesus Christ of Latter Day Saints, shall be allowed to vote at an election in this state is invalid, because in conflict with the provisions of the state constitution extending the right of suffrage to all male citizens of the United States of the age of twenty-one years and upward who have not been convicted of felony or treason.** *Id.*
3. **STATUTE FOR THE REGISTRATION OF VOTERS, which requires a voter, in order to entitle himself to registration, to take an oath that he is not a Mormon, is unconstitutional and void, because it in effect imposes a qualification in addition to those required by the constitution of the state.** *Id.*

4. **REGISTRATION — REMOVAL.** — A registered voter in one precinct who desires to remove to another precinct in the same county must procure a certificate of removal; and if he registers and votes in the latter precinct without such certificate, his vote is illegal and void. *Boyer v. Teague*, 547.
5. **REGISTRATION OF VOTER ON DAY OF ELECTION** is illegal, unless the voter becomes of age on that day, or shows to the judges of election that for some other good reason he has become entitled to vote. *Id.*
6. **REGISTRATION OF VOTER.** — Where the registrar of voters receives a certificate of removal outside his township, administers the proper oath to the voter, and enters his name on the registration-book after his return home, the registration is valid, although he did not have such book with him when he received the certificate of removal. *Id.*
7. **QUALIFICATION OF VOTER.** — One whose true residence is in one township is not a qualified voter of another, where, after escaping from prison, he is hiding as a fugitive from justice. *Id.*
8. **QUALIFIED ELECTOR** of North Carolina is one who has come into the state one year before the election, or has been domiciled within it for that time after forming the purpose to remain; and the intent must be concurrent with the actual occupation of a domicile in the county, to entitle him to the rights of an elector. *Id.*
9. **QUALIFIED ELECTOR — EVIDENCE — DOMICILE IS OFTEN A QUESTION OF INTENT**, and the declarations of an elector, made at the time of voting, are admissible as part of the *res gestæ*, and if made previous to that time, are admissible, if in disparagement of his right. *Id.*
10. **ELECTORS MAY REFUSE TO DISCLOSE FOR WHOM THEY VOTED**, when under oath as witnesses, when they have complied with the law. This privilege, however, is an entirely personal one. *Id.*
11. **CONTEST — EVIDENCE OF ELECTORS.** — As between contestants for an office, the testimony of an elector, if pertinent and relevant, is always admissible, and neither of the parties is called upon to contend for the rights of a witness who does not demand protection, and if compelled to testify against his will, the evidence, competent without objection on his part, should go to the jury for what it is worth. *Id.*
12. **CONTEST COMPELLING ELECTOR TO TELL FOR WHOM HE VOTED.** — The judge who tries a contested election case may, in the exercise of his discretion, determine, certainly as between the contestant and contestee, if there is any evidence at all, how much testimony tending to show the illegality of a particular vote is sufficient as a foundation for compelling the voter to tell for whom he voted. *Id.*
13. **CONTEST — EVIDENCE TO SHOW FOR WHOM BALLOT WAS CAST.** — Where, in an election contest, it does not appear from the direct evidence of the voter for whom his ballot was cast, circumstantial evidence is admissible to establish the fact, and the court may pass upon its sufficiency at any time as a foundation for compelling him to testify, the jury to determine from the evidence for whom the ballot is to be counted. *Id.*
14. **CONTEST — EVIDENCE TO SHOW FOR WHOM BALLOT WAS VOTED.** — In a contested election case, where a certain person was engaged on the day of election in handing out ballots for one of the contesting parties, and for no other person, and he gave a ticket to a certain person, and "voted him," evidence of these facts is competent to show for whom such person voted. *Id.*

15. **EVIDENCE OF FRAUDULENT VOTE.** — The identity of a voter being established, the record of his indictment and conviction is admissible to prove that he voted fraudulently. *Id.*
16. **CONTEST.** — **EVIDENCE OF HOW A CHALLENGED ELECTOR WOULD HAVE VOTED,** or offered to vote, who, on account of the number of voters, failed to have his challenge heard, and failed to vote, is inadmissible in a contested election case. *Id.*
17. **EXCLUSION OF LEGAL VOTERS,** not fraudulently, but through error of judgment, will not defeat an election, notwithstanding the error is one which there is no mode of correcting, since it cannot be shown with certainty, afterwards, how the excluded voters would have voted. *Id.*
18. **EVIDENCE TO SHOW FOR WHOM BALLOT WAS VOTED.** — In a contested election case, evidence that a voter obtained a ballot from a table at the polls, where only one of the contesting parties' ballots were distributed, and that it was obtained from his known agent, and that the voter "came down the line within the ropes, and voted," is admissible as tending to show for whom the ballot was voted. *Id.*
19. **EVIDENCE OF QUALIFICATION OF ELECTOR.** — In a contested election case, evidence of the declaration of a person, when offering to vote, to the effect that he was but twenty years of age, is admissible to establish his minority, although, at the time, a stranger swore that such person was over twenty-one years of age. *Id.*
20. **EVIDENCE OF QUALIFICATION OF VOTERS.** — In a contested election case, evidence that certain voters were, at the time of the election, residents of another county, is admissible to establish the illegality of their votes. *Id.*
21. **QUALIFICATION OF ELECTOR.** — Where an elector has been in the habit of leaving his home in another county every year, and coming into the county where the election was held, for the purpose of working, and then returning to the other county when the season was over, but testifies that he considers the county where the election was held his home, the question of his residence is for the jury. *Id.*
22. **EVIDENCE OF QUALIFICATION OF VOTER.** — In a contested election case, the evidence of a tax collector for the precinct where the election was held, that he made it his duty to ascertain the residence of every person in the precinct, and that a certain voter was never there until a few months before election, never paid taxes there, and that the day following the election he saw him buy a railroad ticket for an adjoining state, from which he did not return, is admissible to show that such voter never acquired a residence in the precinct in which he voted. *Id.*
23. **BURDEN OF PROOF AS TO ILLEGALITY OF BALLOT.** — When an elector is allowed to vote, the burden is on the one who assails the validity of the vote, to show, by a preponderance of evidence, the truth of such facts or circumstances as are relied upon to establish the disqualification. *Id.*
24. **CONTEST — SUFFICIENCY OF COMPLAINT.** — A complaint in a contested election case which states the aggregate number of illegal votes alleged to have been cast for the defendant, the grounds upon which the charges of illegality are based as to each class, and when and where the votes were polled, is sufficient; and the defendant cannot claim as of right, by bill of particulars, a fuller and more definite specification of what the contestant expects to prove. A contestant of an election in a notice or a pleading need not give the contestee the name of every alleged illegal voter as to whom he proposes to offer proof. *Id.*

EMBEZZLEMENT.

See AGENCY, 3; TRUSTS AND TRUSTEES, 1-4.

EMINENT DOMAIN.

1. LAND CONDEMNED AND TAKEN FOR SPECIAL PURPOSES, on the score of public utility, is limited to such purposes, and cannot be appropriated to another use, to the detriment of the owner of the fee. *O'Neal v. Sherman City*, 742.
2. RULE OF COMPENSATION. — It is an established rule, in proceedings for the condemnation of lands, that the just compensation which the land-owner is entitled to receive for his land and the damages thereto must be limited to the tract a portion of which is actually taken. *Owrie v. Waverly etc. R. R. Co.*, 452.
3. MEASURE OF DAMAGES. — The mere plotting of land into blocks on a map does not divide it into separate tracts so as to limit the owner's damages to the value of a particular block, a small parallelogram of which, as it appears on the map, is actually taken under the right of eminent domain. *Id.*
4. PROOF OF SPECIAL VALUE OF LAND CONDEMNED. — The situation and surroundings of land sought for railroad purposes may impart to it a special commercial value for such purposes generally, and the owner may show such special value, and reap the benefit of it, when called upon to part with his land by the compulsory process of condemnation. *Id.*
5. RULE APPLICABLE TO CONDEMNATION OF LAND TO QUASI PUBLIC USES is, that the owner shall be given, by way of compensation for his land, its fair price for any use for which it has a commercial value of its own in the immediate present, or in reasonable anticipation in the near future. The owner is to be compensated for the deprivation of any existing value. *Id.*
6. RULE OF COMPENSATION. — The rule that the special advantage of the land to the party acquiring it by condemnation by right of eminent domain shall not add to the compensation to be paid the land-owner applies to cases where the taking which is advantageous to the taker is not peculiarly disadvantageous to the seller. If, however, the advantageous feature is of such a nature that it is of special commercial value in the hands of either, that one cannot take it from the other without paying for such special value. *Id.*
7. MEASURE OF DAMAGES. — The proper measure of damages for the taking of land by eminent domain for railroad use is the depreciation in the market value of the property caused by the location and construction of the road. This is usually shown, in the ordinary case, by the opinion of witnesses conversant with the property, and the selling price of land in the vicinity. This, however, does not exclude other or better methods of proof; and evidence of elements of disadvantage, and of burden imposed, as the direct result of the location of the road, are admissible, as forming a basis for the computation of damages. *Kearney v. Schuykill etc. R. R. Co.*, 632.
8. ELEMENTS OF DAMAGE. — In estimating damages to property taken by eminent domain for railroad purposes, whatever injuriously affects the property as the direct and necessary result of the location of the road upon it may be considered. *Id.*

3. **MEASURE OF DAMAGES.** — Where the appliances of a lessee, essential to the carrying on of his business, are destroyed by a railroad company in the exercise of the right of eminent domain, evidence of the amount of the lessee's necessary expenditure in reconstructing such appliances for continuing his business, and the increased expense, and less attendant thereon, is admissible in estimating damages, not as specific items of claim, but as affecting the market value of the leasehold. *Id.*

See **HIGHWAYS**, 3-7; **MUNICIPAL CORPORATIONS**, 17-19.

ENCUMBRANCES.

See **INSURANCE**, 5.

EQUITY.

1. **REMEDY.** — Where there is a civil wrong without a remedy at law, equity will take jurisdiction, in order that what is right may be done. *Britton v. Supreme Council*, 376.
2. **PRIORITY OF TIME** gives the better equity as between parties having only equitable interests, only when their equities are in all other respects equal. *Frost v. Wolf*, 761.
3. **PRIORITY OF TIME IS GROUND OF PREFERENCE** last resorted to as between parties having only equitable interests. Equity will not prefer one to the other on the mere ground of priority of time, until it finds, upon an examination of their relative merits, that there is no other sufficient ground of preference between them. If one has any equity better than the other, priority of time is immaterial. *Id.*
4. In determining relative equities of parties having adverse equitable interests, the court must direct its attention to the nature and condition of such interests, the circumstances and manner of their acquisition, and the whole conduct of each party in respect thereto, and then apply the test, not of any technical rule, or rule of partial application, but the same broad principles of right and justice which equity universally applies in deciding upon contested rights. *Id.*
5. **MAXIM THAT EQUITY AID THE VIGILANT**, and not those who slumber on their rights, applied to one who holds a stale equitable title to land. *Id.*

See **DEEDS**, 7; **JUDGMENTS**, 4, 21, 22; **SUBROGATION**.

EQUITABLE INTERESTS.

See **EQUITY**, 2-5.

ERROR.

See **APPEAL AND ERROR**.

ESTOPPEL.

1. **WHEN QUESTION OF LAW.** — When the facts necessary to create an estoppel are admitted, or clearly and conclusively established, the court may declare the law applicable to such facts without submitting them to the jury. *Wachter v. Phoenix Ass. Co.*, 600.
2. **IF THE HOLDER OF CERTAIN INDEBTEDNESS AGAINST A RAILWAY CORPORATION** is also one of its officers, and he makes and publishes a statement of its financial condition, upon the strength of which sales of its bonds are effected to innocent purchasers, he will not be allowed to impair their

security by subsequently showing that his statements were not true, and that he held claims against the corporation which are entitled to precedence over such bonds, and which were not disclosed in such financial statement. *Fidelity etc. Safe Dep. Co. v. Shenandoah etc. R. R. Co.*, 858.

See CORPORATIONS, 7, 8, 11; INSURANCE, 9; JUDGMENTS, 28; WITNESSES, 2.

EVIDENCE.

1. **COMPARISON OF HANDS.** — PAPERS WHICH ARE NOT IN EVIDENCE IN THE CASE, and the signatures to which are not admitted to be genuine, cannot be used for the purpose of making comparison between the signatures thereto attached and the signatures on a bond or other paper in a suit. *White Sewing-Machine Co. v. Gordon*, 109.
 2. **PHOTOGRAPHS ARE SECONDARY EVIDENCE**, and therefore not admissible when the original can be produced in court. *Id.*
 3. **MICROSCOPIC ENLARGEMENT OF SIGNATURE IS NOT ADMISSIBLE** in evidence when the original signature is in court. *Id.*
 4. **LETTERS AND OTHER PAPERS ARE NOT ADMISSIBLE IN EVIDENCE WHEN THE SIGNATURES THERETO ARE NOT ADMITTED TO BE GENUINE**, and they are not relevant to any issue in the case, and the only object of putting them in evidence must be for the purpose of comparing the signatures thereon with the signature on the bond in suit. *Id.*
 5. **RECORD OF FORMER SUIT WHEN NOT ADMISSIBLE.** — When plaintiff in ejectment claims title as the grantee of certain parties alleged to be sole heirs of the original patentee, and defendant claims under another person as heir of the same patentee, the record in a suit in which such alleged sole heirs recovered other land as the sole heirs of the patentee as against a third person is not admissible against defendant, who was not a party to that suit, to prove that such persons were the sole heirs of the patentee. *Freeman v. Hawkins*, 269.
 6. **THE RES GESTÆ ARE THOSE CIRCUMSTANCES WHICH ARE THE UNDESIGNED INCIDENTS OF A PARTICULAR LITIGATED ACT**, and which are admissible when illustrative of such act. These incidents may be separated from the act by a lapse of time more or less appreciable, but they must stand in immediate causal relation to the act, a relation not broken by the interposition of voluntary individual wariness seeking to manufacture evidence for itself. *Ward v. White*, 883.
 7. **RES GESTÆ.** — STATEMENTS MADE BY PERSONS WHEN LEAVING THEIR HOME, AS TO THEIR INTENDED DESTINATION, are not hearsay, and are therefore admissible as evidence in an action to recover damages suffered by them at a railway crossing by the collision with a train. *Cincinnati etc. R'y Co. v. Howard*, 96.
- See ASSAULT, 2; CRIMINAL LAW, 6-12, 18-23, 25, 26, 29, 41-46; DEEDS, 5-12; DEPOSITIONS; ELECTIONS, 9-23; FRAUD, 2; FRAUDULENT CONVEYANCES, 2, 4, 5; INNKEEPERS, 4; INSURANCE, 7, 18, 19; JUDGMENTS, 18; STATUTES, 6; TRUSTS AND TRUSTEES, 9, 10; USAGE; WILLS, 11.

EXCESSIVE DAMAGES.

See ASSAULT, 3.

EXECUTIONS.

1. **PROCEEDS OF CONTRACT MADE IN WIFE'S NAME.** — If a wife enters into a contract to get out cross-ties for a railway company, and her husband

conducts the business for her, the ties are not subject to execution in favor of his creditors, though the contract was made in her name for the purpose of preventing the ties from being subject to such execution. *Buckley v. Dunn*, 334.

2. **SHERIFF'S RETURN MAY BE IMPEACHED**, and shown to be without validity as to a judgment creditor, by proof that the date of levy under another judgment was no part of the sheriff's return thereon, that the return as in fact made was without date, and that the date appearing therein was afterwards inserted by the sheriff; and this although specific instructions to the sheriff accompanied the writ to levy upon certain property specifically described. *Henderson v. Henderson*, 650.
- See ATTACHMENT AND GARNISHMENT**, 2-4; **JUDGMENTS**, 1; **MORTGAGES**, 8, 10; **WILLS**, 10.

EXECUTORS AND ADMINISTRATORS.

1. **CONFLICT OF LAWS**. — A GRANT OF ADMINISTRATION has generally no operation outside of the state from whose jurisdiction it was derived. Hence, ordinarily, no suit can be maintained by or against any executor or administrator in his official capacity in the courts of another state from that in which he was appointed. *Fugate v. Moore*, 928.
2. **CONFLICT OF LAWS — FOREIGN EXECUTOR, SUIT AGAINST**. — One appointed executor in another state, but who resides in this state, and who has collected assets in the state where he was appointed, which he has not brought into this state, cannot be sued here for the purpose of recovering a legacy to which the complainant claims to be entitled under the will of the defendant's testator. *Id.*
3. **INTEREST OF AN HEIR IN THE REAL ESTATE OF HIS ANCESTOR SHOULD NOT BE DECREED TO BE SOLD** before directing a settlement of the administrator's accounts. *Bowden v. Parrish*, 873.

EXEMPTIONS.

See ATTACHMENT AND GARNISHMENT, 2-4; **CORPORATIONS**, 4; **WILLS**, 10.

FEEES AND SALARIES.

See ASSIGNMENT, 2; **CORPORATIONS**, 18, 17.

FINDINGS.

See APPEAL AND ERROR, 4, 5.

FIRE INSURANCE.

See INSURANCE, 1-22.

FIXTURES.

INTENTION AS TEST. — The machinery and apparatus of an electric-light plant will not pass under a judicial sale of the real estate to which they are annexed, when it is shown that when they were so annexed it was intended that they should remain temporarily. Mere physical annexation is no longer the test. *Vail v. Weaver*, 598.

FORCIBLE ENTRY AND UNLAWFUL DETAINER.

TRESPASS — MEASURE OF DAMAGES. — A forcible entry by the owner or his agent against one in the peaceable possession of lands, who is not a re-

cent trespasser or intruder, is a trespass, without regard to the amount of force used, for which nominal damages may always be recovered, and also such damages as are inflicted on the person or fixtures of the party in possession. Exemplary damages, if the unlawful entry was done in a wanton or reckless manner, may also be awarded. *Mosseller v. Deaver*, 540.

FORECLOSURE.

See MORTGAGES, 6-10.

FOREIGN EXECUTORS.

See EXECUTORS AND ADMINISTRATORS.

FRAUD.

1. **FRAUD OR FAIRNESS NOT RESULTING IN LEGAL INJURY** can neither be made the foundation of an action nor the ground of a defense. *Britton v. Supreme Council*, 376.
 2. **PROOF OF.** — While fraud will not be assumed without proof, still, it is oftener shown by circumstances than in any other mode; and when things appear that are contrary to the ordinary ways of honest business men, and call for explanations which might be but are not given, fraud will be inferred. When the questionable transactions occur frequently, and are the general characteristics of the conduct and statements of the parties, it is their own fault if they are held to the consequences. *Webber v. Jackson*, 165.
- See ELECTIONS, 15; FRAUDULENT CONVEYANCES; JUDGMENTS, 22, 23, 29; LIMITATIONS OF ACTIONS; MARRIAGE AND DIVORCE, 1; SALES, 5-8; BONA FIDE PURCHASERS; TRADE-MARKS, 5; WITNESSES, 2.

FRAUDULENT CONVEYANCES.

1. **FRAUDULENT CONVEYANCE BY HEIR.** — When land is devised to an executor, with absolute power to sell and divide the proceeds among the heirs, and they have elected to take the land instead of the money, and have agreed upon a partition among themselves, and one of them, to put his share beyond the reach of creditors, has had it conveyed to his wife instead of to himself, the conveyance is fraudulent and void as to his creditors. *Henderson v. Henderson*, 650.
2. **INSTRUCTIONS.** — Where in an action to set aside a conveyance as fraudulent the fraud cannot be shown by direct proof, and circumstantial evidence is relied upon for that purpose, the attention of the jury must be directed to the effect of the united force of such evidence; and it is error to take it up item by item and dismiss it, with the conclusion that it does not prove the case. *Montgomery Web Co. v. Dinell*, 663.
3. **FRAUDULENT CONVEYANCE BY CORPORATION.** — Where one corporation sells its property to another, thereby forming a new corporation composed mostly, if not wholly, of the same persons, the transaction is fraudulent and void as to creditors of the old corporation not assenting thereto, and persons who hold stock in the new corporation, solely in consideration of their claims as creditors of the old one, are chargeable with notice of the fraud, and are not innocent purchasers as against execution creditors of the old corporation who did not assent to the change. The latter may follow the specific property of the old corporation, as in other cases of transfers fraudulent as to creditors. *Id.*

4. **BURDEN OF PROOF.** — If a transaction is shown to have been made with a fraudulent purpose on the part of the grantor, this makes a *prima facie* case in favor of those who are entitled to attack such deed or transfer, which must be met by counter-proof on the part of the grantees, or those claiming under him, tending to show that the grantee was a purchaser for value, and without notice of the grantor's fraud. *Richards v. Vascaro*, 322.
5. **FRAUD, PRESUMPTION REGARDING.** — While fraud is never to be presumed, yet if a transaction is shown to be fraudulent on the part of one of the actors, then it is not incumbent on the party attacking the transaction to prove the fraud of the other actor claiming under it. *Id.*
6. **JUDGMENT CREDITOR MUST PROVE EXISTENCE OF DEBT AT TIME OF CONVEYANCE SOUGHT TO BE SET ASIDE AS FRAUDULENT.** — When a judgment creditor brings an action to set aside, as fraudulent as to creditors, a conveyance of real estate made by the debtor prior to the judgment, he must show that the debt for which the judgment was rendered existed at the time of the conveyance. And the judgment, as against the grantee, does not prove such existence. *Bloom v. Moy*, 243.
7. **FRAUDULENT JUDGMENT DEBTOR** cannot regain his own property which he has attempted to put beyond the reach of creditors, by purchasing it through another, under a subsequent judgment against himself; and the purchase-money so paid by him will be regarded as having been paid in satisfaction of his just obligations. *Bisner v. Helleman*, 449.
8. **DEED EXECUTED BY ONE BROTHER TO ANOTHER**, without the signature of the grantor's wife, and then recorded, but never delivered, the grantor remaining in possession and receiving the rents and profits without accounting for them, is fraudulent and void as against a judgment creditor of the grantor, especially when such deed was executed during the pendency of the action, and neither of the parties to it state any of the facts surrounding its execution, or any consideration therefor, except the statement that if any such deed was made, it was executed in good faith and for a valuable consideration, upon a settlement between them. The production of notes many years past due and otherwise suspicious looking, claiming them as evidence of indebtedness to satisfy which such deed was executed, will not give it validity as against such judgment creditor. *Webber v. Jackson*, 165.

See JUDGMENTS, 2, 3.

GARNISHMENT.

See ATTACHMENT AND GARNISHMENTS.

GAS-PIPES.

See HIGHWAYS, 4, 5.

GRANTS.

See DEDICATION.

GUESTS.

See INNKEEPERS.

HANDWRITING.

See EVIDENCE, 1.

HAWKERS.

See PEDDLERS.

HEARSAY EVIDENCE.

See CRIMINAL LAW, 46; EVIDENCE, 7.

HIGHWAYS.

1. **THE PUBLIC ACQUIRES A MERE RIGHT OF PASSAGE OVER A HIGHWAY.** — The freehold, and all profits of the soil, belong still to the proprietor from whom the right of passage was acquired, and he may make any use of his lands not inconsistent with the enjoyment of such right of passage. *Western Union Tel. Co. v. Williams*, 908.
2. **PRESUMPTION RESPECTING OWNERSHIP OF THE LAND** over which a highway runs is, that the adjacent proprietors each own to the middle of such highway; or, if the same person owns on both sides, that the whole road belongs to him, subject to the public easement of the right of passage in either case. *Id.*
3. **ABUTTERS ON A PUBLIC SUBURBAN HIGHWAY HAVE A RIGHT** therein distinct from that of the public, which the legislature cannot take away, except to appropriate it to a public use upon payment of compensation. The public has no interest in such a highway, other than the right to pass and repass over it. *Kincaid v. Indianapolis Natural Gas Co.*, 113.
4. **LAYING GAS-PIPES IN A SUBURBAN ROAD IS THE IMPOSITION OF AN ADDITIONAL BURDEN**, for which compensation must be made to the land-owner. *Id.*
5. **INJUNCTION WILL NOT BE ISSUED AT THE SUIT OF AN ABUTTING LAND-OWNER** to prevent the maintenance of a line of gas-pipes in a public highway, where large sums of money have been expended by the gas company on the faith of a license granted to it by the board of commissioners, and the complaining land-owner, with full knowledge of all the facts, made no objection until the company had constructed its main line and system at great expense. His remedy is by action to recover damages for the invasion of his rights. *Id.*
6. **ADDITIONAL SERVITUDE.** — **THE ERECTION OF A TELEGRAPH LINE** upon a highway is an additional servitude, for which compensation must be made to the owner of the fee, and the legislature has no power to authorize the imposition of such servitude, except on condition that due compensation shall be made therefor to the owner of the lands covered by such highway. *Western Union Tel. Co. v. Williams*, 908.
7. **RIGHT TO USE, FOR PUBLIC PASTURE.** — The owner of animals must keep them upon his own premises, and while he may use a public highway for the purpose of driving them from place to place, or may pasture them therein opposite his own premises, he cannot use such highway for a public pasture, nor pasture opposite the land of others even when the animals are in charge of a keeper. Such use is not an incident of travel for which the highway is dedicated, and it is doubtful whether authority could be conferred upon the proper officers to permit such use. *Robinson v. Flint etc. R. R. Co.*, 174.

HOMICIDE.

See CRIMINAL LAW, 24-30.

HOTELS.

See INNKEEPERS.

HUSBAND AND WIFE.

AGENCY. — WIFE MAY APPOINT HER HUSBAND HER AGENT by power of attorney to convey her inchoate interest in his real estate. *Wilkinson v. Elliott*, 158.

See CRIMINAL LAW, 12, 36; EXECUTIONS, 1; LIE PENDENS; MARRIAGE AND DIVORCE; TRUSTS AND TRUSTEES, 11, 12.

IDEM SONANS.

See CRIMINAL LAW, 2, 2.

INDICTMENT.

See CRIMINAL LAW.

INDORSEMENT.

See NEGOTIABLE INSTRUMENTS, 7.

INFANTICIDE.

See CRIMINAL LAW, 30.

INFANTS.

See NEGLIGENCE, 9; RAILROAD COMPANIES, 12, 14.

INJUNCTIONS.

See DEDICATION, 2; HIGHWAYS, 5; MORTGAGES, 2-4.

INNKEEPERS.

1. INNKEEPER IS BOUND TO PAY FOR GOODS STOLEN IN HIS HOUSE FROM A GUEST, unless stolen by the servant or companion of the guest; and however vigilant the landlord may have been, he is responsible to the party losing the property. *Shultz v. Wall*, 686.
2. CONDUCT OF GUEST CONTRIBUTING TO HIS LOSS IS ALWAYS DEFENSE. — The conduct of a guest of an inn, whether voluntary or negligent, contributing to his loss, is always a defense in an action against the innkeeper to recover for property lost or stolen in the inn; and the guest's failure to deposit valuables in a safe place provided for the purpose by the landlord, after being notified so to do, and his neglect to make use of sufficient fastenings provided for the security of the room from which they are stolen, constitute evidence of contributory negligence on his part. *Id.*
3. NOTICE THAT PLACE FOR DEPOSIT OF VALUABLES IN HOTEL HAS BEEN PROVIDED. — The provisions of the Pennsylvania act in regard to the places where notices that a place of deposit for valuables of guests in hotels has been provided shall be posted may be said to be mandatory in the sense that, as they amount to constructive notice, they must be strictly complied with, if constructive notice is relied on; but if notice in fact be proved, then these provisions become immaterial. *Id.*
4. JURORS ARE NOT BOUND TO BELIEVE AN INCREDIBLE STORY, even though no witness contradicts it; and where the circumstances surrounding a

theft from the room of a guest in a hotel indicate that it could not have occurred if he had fastened the door, the question of contributory negligence should be submitted to the jury, notwithstanding his testimony that he did fasten the door is uncontradicted. *Id.*

8. **RIGHT TO EXCLUDE DRUMMERS.** — An innkeeper need not admit and has power to prohibit the entrance of any person or class of persons into his house for the purpose of plying his guests with solicitations for patronage in their business; and the guest has a positive right to demand of the host such protection as will exempt him from annoyance by persons who intrude upon him, without invitation and without welcome, to subject him to torture by a display of their goods, or a recommendation of their nostrums or business. *State v. Steele*, 573.
9. **GUESTS OF A HOTEL, AND TRAVELERS OR OTHER PERSONS** entering it with the *bona fide* intent of becoming guests, cannot be lawfully prevented from going in, or be put out by force after entrance, provided they are able to pay the charges, and tender them if requested by the landlord, unless they are persons of bad or suspicious character, vulgar habits, or so objectionable to patrons of the house, on account of race, that it would injure the business to admit them to all portions of the hotel, or unless they attempt to take advantage of the freedom thereof to injure the landlord's chances of profit derived either from his inn, or any other business incidental to or connected with its management, and constituting a part of the provision for the wants or pleasure of his patrons. *Id.*
7. **WHO MAY BE EXCLUDED FROM HOTEL.** — When persons, unobjectionable on account of character or race, enter a hotel, not as guests, but intent on pleasure or profit, to be derived from intercourse with its inmates, they are there, not of right, but under an implied license, that may be revoked at any time by the innkeeper, who may expel, without unnecessary force, all who have not acquired rights growing out of the relation of guest, and must expel all who, by their conduct, create a nuisance, and prove an annoyance to his patrons. *Id.*
8. **REGULATION**, made by an innkeeper, that proprietors of livery-stables, and their agents and servants, shall not be allowed to enter his hotel for the purpose of soliciting patronage for their business from his guests, is a reasonable one; and after notice to desist, a person violating it may be lawfully expelled from the house, if excessive force is not used in ejecting him. *Id.*
9. **INNKEEPER MAY ESTABLISH LIVERY-STABLE, NEWS-STAND, BARBER-SHOP, OR LAUNDRY** in connection with his hotel, and exclude all who come soliciting such business; or he may contract with the proprietor of a livery-stable in the vicinity to secure for the latter, so far as he legitimately can, the patronage of his guests in that line for a per centum of the proceeds derived from such business with the patrons of his house. He may then make, and after personal notice to violators enforce, a rule excluding from his hotel the agents and representatives of other livery-stables who enter to solicit the patronage of his guests; and where one has persisted in visiting the hotel for that purpose, after notice to desist, he may use sufficient force to expel him, upon his refusal to leave, and may eject him, even though on a particular occasion he may have entered for a lawful purpose, if he does not discontinue it when requested to leave, and has in fact been soliciting the patronage of guests. *Id.*
10. **RIGHT TO EJECT PARTY NOT GUEST.** — An innkeeper has a right to request a party who visits his inn, not as a guest or on business with guests,

to depart, and if he refuses, the innkeeper may gently lay his hands upon him to lead him out, and if he resists, employ sufficient force to eject him. For so doing he can justify on a prosecution for assault and battery. *Id.*

11. **RIGHT TO DISCRIMINATE AGAINST DRUMMERS.** — An innkeeper may make a valid contract for a valuable consideration with a certain livery-stable keeper, and give him the exclusive right to remain in the hotel and solicit patronage from the guests, and such innkeeper may expel, without unnecessary force, the agent of a rival stable, who, after notice to desist, persists in soliciting patronage from the guests; nor is his right to expel such agent forfeited by failing to order the agent of another stable out of the hotel, when found soliciting patronage therein after having received notice to desist. *Id.*
12. **REGULATION ADOPTED BY AN INNKEEPER** that "no livery-man or agent of any transportation or baggage company, no washer-woman or sewing-woman not connected with the house, or loafer or loungee or objectionable person, will be allowed in the hotel," is reasonable and valid. *Id.*

INSTALLMENTS.

See **CONTRACTS**, 5; **JUDGMENTS**, 14.

INSTRUCTIONS.

See **TRIAL**.

INSURANCE.

1. **CONSTRUCTION OF POLICY.** — A policy of insurance is to be read in the light of circumstances which surround it, and interpreted most strongly against the insurer. *Philadelphia Tool Co. v. British Amer. Assur. Co.*, 596.
2. **POLICIES OF INSURANCE ARE TO BE CONSTRUED** with reference to the intentions of the parties, to be ascertained from the terms and conditions placed therein. *Continental Ins. Co. v. Kyle*, 77.
3. **CONSTRUING CONDITIONS AGAINST BECOMING VACANT AND UNOCCUPIED.** — In construing a condition in an insurance policy against vacancy or unoccupancy, the courts will look to the subject-matter of the contract. The occupancy of a dwelling, of a mill, or of a barn, is each essentially different in its scope and character, and the construction must be with reference thereto. *Id.*
4. **CONDITION AGAINST DWELLING BECOMING VACANT AND UNOCCUPIED** is broken if the former tenant moved out five days before the fire, though the building had been leased to another, who had made some repairs, and left some planes in the house, had hauled some hay, and put it in a stable-loft, and buried some potatoes on the premises, and intended to move in on the following day. *Id.*
5. **CONDITIONS AGAINST ENCUMBRANCES IN POLICY OF INSURANCE NOT VIOLATED WHEN.** — Where the insured, when applying for the insurance, informs the insurer of the amount of encumbrances then existing upon the property, and the latter issues the policy with knowledge of such encumbrances, the condition against encumbrances is not violated, if their amount never exceeds the amount stated. *Gould v. Dwelling-house Ins. Co.*, 717.

6. **RATIFICATION OF ASSIGNMENT OF INSURANCE POLICY.** — If a notice of insurance contains a provision that it shall be void if assigned before a loss, without the consent of the insurer indorsed thereon, and the insurer places on it an indorsement making the loss, if any, payable to a third person, this indorsement operates as a ratification of a prior agreement of the insured to the same effect, made without the previous consent of the insurer. *Id.*
7. **RULE THAT OFFERS OF COMPROMISE ARE NOT ADMISSIBLE NOT TRANSGRESSED WHEN.** — The rule that offers of compromise are not admissible is not transgressed by admitting testimony of an offer of an insurer to compromise solely on the question of waiver, and limited carefully to that in the charge to the jury, and not as evidence of the plaintiff's claim. *Id.*
8. **CONDITION AVOIDING POLICY IF INTEREST OF THE INSURED BE OTHER THAN AN ABSOLUTE FREE-SIMPLE** means only that he shall not have a limited interest, but shall claim and hold under a conveyance purporting to invest him with an estate in fee; but an applicant for insurance is not called upon to settle questions of title with very great precision, and the fact that there is a naked legal title outstanding will not avoid the policy if the assured is the entire beneficial owner of the premises. *Phoenix Ins. Co. v. Bowdre*, 326.
9. **ESTOPPEL BY APPROVING ACT OF AGENT.** — When a soliciting agent for an insurance company, after issuing a policy, indorses a clause thereon making it payable, in case of loss, to a mortgagee, which act was approved by the company, and subsequently to which the agent assured the parties that nothing more need be done to secure the mortgagee in case of sale of the property, the company will be estopped, in the event of loss after such sale, to deny the authority of the agent to make such assurance. *Wachter v. Phoenix Assur. Co.*, 600.
10. **GENERAL AGENT, WHO IS.** — One who is appointed by an insurance company in one state as its agent for the transaction of the business of insurance in another state during a designated year, and who is authorized to make contracts of insurance and to issue policies, is a general agent; and his principal is bound by a notice to him, or by anything said or done by him in relation to the contract or risk, either before or after the contract is made. *Phoenix Ins. Co. v. Bowdre*, 326.
11. **WAIVER OF CONDITIONS BY AGENT.** — If a policy of insurance contains a condition of forfeiture for false representations as to encumbrances, and makes the statements of the insured, as they appear in the policy, a warranty of their truth, and the applicant gives correct answers respecting encumbrances to the general agent of the company, who fails to mention them in the policy, and procures the signature of the assured, accepts the premium and issues the policy, the insurance company will be deemed to have waived the condition and held liable on the policy in case of loss. *German Ins. Co. v. Gray*, 150.
12. **PAROL WAIVER OF CONDITION BY GENERAL AGENT.** — A policy of insurance can be modified or a condition therein waived by parol, by the general agent of the insurance company. *Id.*
13. **PAROL WAIVER OF CONDITION.** — An insurance company or its general agent may waive by parol a condition in the policy respecting encumbrances, although the policy provides that no agent of the company, or other person than the president or secretary, shall have authority to waive any of the terms or conditions of the policy, or make any indorse-

ment thereon, and that all agreements by the officers named must be signed by either of them. *Id.*

24. **SUFFICIENCY OF PROOFS OF LOSS.** — When, after loss, proofs thereof are reduced to writing, signed and sworn to by the insured at the request of the adjuster of the insurance company, and then delivered to him, after which neither he, the company, nor any one representing it, returns such proofs or claims that they are insufficient, but on the contrary, satisfaction with them is expressed, together with a statement that the loss will soon be paid, the assured has a right to assume, until notified to the contrary, that no other or different proofs will be required, and the company is estopped from claiming that they are insufficient. *Id.*

25. **LIMITATIONS IN POLICY, HOW FAR BINDING ON ASSURED — POWER OF LOCAL AGENT TO WAIVE CONDITIONS.** — One who, in procuring insurance, acts in good faith, and without knowledge of any limitations upon the authority of the agent of the company effecting the insurance, may safely assume that the agent is a general agent of the company; that he stands in the place of the company, which will be bound by any terms or conditions to which he may agree while acting for the company in consummating the insurance. This rule does not apply, however, when the policy has already been executed and delivered to the assured, has gone into full force and effect, and gives notice upon its face of limitations upon the authority of the local agent, or upon all agents, except some particular agent, of the company. In such cases, the assured will be presumed to take notice of such limitations from the face of his policy, and will be bound by them, notwithstanding a waiver thereof by the local agent. *Burlington Ins. Co. v. Gibbons*, 118.

26. **WAIVER OF CONDITIONS IN POLICY BY LOCAL AGENT.** — If an agent has authority only to solicit insurance and consummate the same, or to issue the policy, with no authority to subsequently change or waive any of its terms or conditions, any attempted change or waiver by him, after the policy has issued, is generally void; and in the absence of any showing to the contrary, it will ordinarily be presumed that the assured, or any person claiming under him, had knowledge of the terms and conditions of the policy. Hence, if the policy provides that it shall become void if the property insured shall become vacant, unoccupied, or uninhabited, without the consent of the secretary of the company indorsed on the policy, a waiver of this condition by the local agent, after the insurance is effected, is unauthorized, and renders the policy void. *Id.*

27. **PAROL WAIVER.** — NOTWITHSTANDING A CONDITION IN THE POLICY OF INSURANCE that "it is understood and agreed that the agents of this company have no authority in any manner, or by any act or omission whatever, either before or after making this contract, to waive, alter, modify, strike from this policy, or otherwise to change any of its conditions or restrictions, except by distinct, specific agreement, clearly expressed and indorsed hereupon, and signed by the agent making it," a parol waiver by an agent, of defects in proof of loss, is effectual. *Phenix Ins. Co. v. Bowdre*, 326.

28. **PAROL EVIDENCE IS ADMISSIBLE TO SHOW WAIVER BY ACTS IN PAIS OF INSURER,** notwithstanding a stipulation in the policy that nothing less than an express agreement indorsed on the policy shall be construed as a waiver of any of its conditions or restrictions. But if the policy contains a condition that it shall be void if the property insured be encumbered at its date, or afterwards become so, without notice to the insurer,

it will be the duty of the insured to establish the partial waiver by a clear preponderance of evidence. *McFarland v. Kittinging Ins. Co.*, 722.

19. **EVIDENCE OF WAIVER, WHAT SUFFICIENT.**—Where an insurer, having knowledge of all the facts upon which he might be able to avoid the policy, misleads and delays the insurer by promising to pay the loss, prevents him from rebuilding by his negotiations, puts him to the trouble and expense of proving his loss, and procures the adjustment, by appraisers, of the amount of the loss, binding and conclusive under the conditions of the policy, there is sufficient evidence of waiver to go to the jury. *Id.*
20. **WAIVER OF CONDITIONS.**—Where a policy of insurance on tools and buildings of the assured, who has only a leasehold interest in the buildings and in the land upon which they rest, is issued, and an entire premium paid, without any application, written request, or representation of any kind by the assured relative to his interest in the buildings, it is valid and binding, notwithstanding conditions therein that it shall be void if the insured is not the sole and unconditional owner of the property, or if the buildings stand on land not owned by him in fee-simple, or if his interest is not truly stated in the policy. In such case it will be assumed that the policy was written upon the knowledge of the insurer through its representative, and intended to cover, in good faith, the interest which the insured had in the buildings. *Philadelphia Tool Co. v. British America Assur. Co.*, 596.
21. **ADMISSIBILITY OF PROOFS OF LOSS IN ACTION ON POLICY OF INSURANCE SHOULD BE PASSED UPON WHEN.**—If in an action upon a policy of insurance the defendant objects to the proofs of loss, it is more regular and the better practice to first hear evidence of a waiver, and then pass upon the admissibility of the proofs of loss; but if evidence of waiver be subsequently given sufficient to take that question to the jury, it is a mere matter of the order of proof, which is within the discretion of the court. *Gould v. Dwelling-house Ins. Co.*, 717.
22. **NOTICE OF OBJECTION TO PROOFS OF LOSS, DUTY OF INSURER TO GIVE, PROMPTLY.**—If the insured, in good faith and within the stipulated time, does what he plainly intends as a compliance with the requirements of his policy in respect to proofs of loss, good faith requires that the insurer shall promptly notify him of objections thereto, so as to give him the opportunity to obviate them; and mere silence may so mislead him to his disadvantage as to be of itself sufficient evidence of waiver by estoppel. But if without valid reason the insured fails to comply with the requirements of his policy at all, or to do so within the stipulated time, then the liability of the insurer is discharged, and mere silence or investigation, or even negotiation, will not revive the contract. Nothing will do that short of an express agreement, or a change of position by the insured, to his disadvantage, reasonably induced by the acts of the insurer. *Id.*
23. **INSURER IS NOT RELIEVED FROM DUTY OF GIVING NOTICE OF HIS OBJECTIONS** to the proofs of loss by the insured by the fact that the proofs were received only three days prior to the end of the period limited for their presentation. Where the proofs are in time, there is no room to speculate what the insured might, by diligence, have done in the three days left to him. He has a right to have an opportunity to correct the defects in his proofs, if he can. *Id.*

24. **SUMMONS ON INSURED DEFENSE TO ACTION ON POLICY WHEN.** — Where a policy of life insurance contains a condition that in case the insured shall die by his own hand, whether sane or insane, the policy shall become null and void, the suicide of the insured will bar a recovery on the policy, notwithstanding another condition of the policy provides that the policy shall be subject to the provisions of a statute which enacts that "all companies, after having received three annual premiums on any policy issued on the life of any person in this state, are estopped from defending, upon any other ground than fraud, against any claim arising upon such policy by reason of any errors, omissions, or misstatements of the assured, in any application made by such assured, on which the policy was issued, except as to age." The latter condition does not affect the former one, but relates solely to defenses based on errors, omissions, or misstatements in the application. *Starek v. Union C. Life Ins. Co.*, 674.
25. **CONDITION IN CERTIFICATE OF MEMBERSHIP** of a mutual benefit society denying agents the power to make, alter, or discharge contracts, waive forfeitures, or extend credits has no application to the general manager or secretary of the association. *Bankers' etc. Mut. Ben. Ass'n v. Stapp*, 772.
26. **MEMBERSHIP — PAYMENT OF FEE.** — When, in an action on a certificate of membership in a benefit society, the defense of non-payment of the fee required as a condition precedent to membership is relied upon, and it is shown that the association had forwarded a certificate to the deceased, whose account as its agent was in a confused condition, and who had received, as an overpayment, part of a remittance sent him as its agent, after it had received from him an installment of annual dues, published his name in a list of members, and had levied a mortuary assessment on him as if he were a member, the jury is warranted in finding that the certificate was issued on credit; that the fee had been paid, or its payment waived as a condition precedent. *Id.*
27. **ASSESSMENT PAID BY BENEFICIARY.** — Where the certificate of membership in a mutual benefit society provides that assessments shall be paid within thirty days from the date of notice, payment within that time will preserve the validity of the certificate, though such payment is made by the beneficiary after the death of the member. *Id.*
28. **WHO MAY BE MADE BENEFICIARIES.** — If a corporation is organized under a statute authorizing the formation of corporations to accumulate a fund to be paid to the widows and children of deceased members, the corporation can pay the fund to such persons only, and an agreement on the part of such corporation or its member to pay a part of such fund to any other person is *ultra vires* and void. *Britton v. Supreme Council*, 376.
29. **REPRESENTATIONS NOT AFFECTING BENEFICIARY.** — Where an applicant for membership in a corporation formed to accumulate a fund for the benefit of the widows and children of deceased members makes a false representation as to his relationship to the named beneficiary, this does not constitute a warranty so as to preclude his real beneficiary from recovering on the contract. *Id.*
30. **BENEFICIARIES.** — Where the beneficiaries of a corporation are prescribed by law, it is an evasion of its policy and a violation of its charter to say that where a member has named a person not within the class to be benefited, and the corporation has issued the certificate to such person, such

acts shall deprive the proper person or class of persons of all right or interest in the fund. *Id.*

81. "LEGAL HEIRS." — Where the by-laws of a corporation formed to accumulate a fund for the benefit of the widows and children of deceased members direct that in case a member shall have made no disposition of the benefit payable on his death, it shall be paid to his legal heirs dependent on him, the term "legal heirs" will include his next of kin dependent upon him at the time of his death. *Id.*

INTENT.

See CRIMINAL LAW.

INTEREST.

See ATTACHMENT AND GARNISHMENT, 5.

INTERSTATE COMMERCE.

THE MANUFACTURE OF THAT WHICH MAY BECOME A SUBJECT OF COMMERCE and ultimately pass into protected trade is not commerce, nor can manufactories of any sort be instruments of commerce within the meaning of the doctrine of interstate commerce. *Standard U. Cable Co. v. Attorney-General*, 394.

See STATUTES, 10.

JOINDER OF OFFENSES.

See CRIMINAL LAW, 1.

JUDGE.

See JUDGMENTS, 26-28.

JUDGMENTS.

1. JUDGMENT LIENS, EQUITABLE TITLE NOT SUBJECT TO. — When land is devised to an executor, with absolute power to sell and divide the proceeds among the heirs, the latter may elect, by some decisive act to that effect, to take the land in lieu of the money, and such election will vest an equitable title in them, which cannot be subjected to judgment or mortgage liens, or taken in execution. *Henderson v. Henderson*, 650.
2. FRAUDULENT CONVEYANCE — LIEN. — A judgment recovered subsequently to a fraudulent conveyance, and based upon indebtedness contracted partly prior and partly subsequent thereto, is a lien upon the property of the judgment debtor only to the extent of the indebtedness contracted prior to the fraudulent conveyance. *Id.*
3. FRAUDULENT CONVEYANCE — LIEN. — Where an heir elects to take land instead of money, under a power contained in the testator's will and has the land conveyed to his wife in fraud of his creditors, a defrauded judgment creditor who sells the land as the property of the husband does not thereby acquire a preference over prior liens on the ground that his judgment was used as the instrument of sale; nor will the fact that, prior to such election and conveyance, the heir assigned to him, as security for his debt, his interest in the fund to arise from the sale directed by the will, give him such preference. It is the debtor's estate which is sold; and the liens upon it which attached subsequently to the fraudulent conveyance must be paid in their order as to priority. *Id.*

4. **PRIORITY OF DOCKETED JUDGMENT OVER EQUITY TO HAVE DEED REFORMED.** — A docketed judgment has precedence not only over an unrecorded deed of which the judgment creditor has no other notice, but also over a mere equity on the part of a grantee, of which the judgment creditor has no notice, to have a deed reformed so as to make it include the real estate in question. *Wilcox v. Leominster Nat. Bank*, 259.
5. **PRESUMPTIONS OF JURISDICTION.** — If a statute requires a return of service of process to state certain jurisdictional facts, no presumption will be indulged in favor of a judgment based upon a return which omits such facts, and the judgment will be treated as void when attacked collaterally. *Shenandoah etc. R. R. Co. v. Ashby*, 898.
6. **ACTION TO SET ASIDE JUDGMENT ENTERED WITHOUT OBTAINING JURISDICTION.** — An action may be maintained to set aside a judgment rendered by a court which had obtained no jurisdiction from want of service of process. And in such action, it is not necessary for the plaintiff to show that he had a defense to the first action, where the equitable and legal jurisdictions are united in the same court, and the action is prosecuted in the same court in which the judgment was rendered. *Magin v. Lamb*, 216.
7. **ACTION TO SET ASIDE JUDGMENT MAY BE MAINTAINED AGAINST ASSIGNEE** thereof, and the original judgment creditor need not be made a party thereto. *Id.*
8. **COLLATERAL ATTACK.** — A judgment of a court of competent jurisdiction cannot be collaterally impeached, unless the record shows affirmatively the want of jurisdiction. *Williams v. Haynes*, 752.
9. **COLLATERAL ATTACK.** — In a collateral attack on a judgment, evidence of fraud not found in the judgment roll will not be received to avoid the judgment, though the fraud was in obtaining jurisdiction. *Id.*
10. **CONCLUSIVENESS OF.** — A domestic judgment of a court of general jurisdiction, upon a subject-matter within the ordinary scope of its power, is entitled to such absolute verity that, in a collateral action, even where the record is silent as to notice, the presumption that the court had jurisdiction of the person is so conclusive that evidence *aliunde* will not be admitted to contradict it. *Wilkinson v. Schoonmaker*, 803.
11. **COLLATERAL ATTACK.** — In collateral proceedings, as between parties and privies, the only contingency in which the judgment of a court of general jurisdiction can be questioned is where the record shows affirmatively that jurisdiction did not attach in the particular case. *Id.*
12. **COLLATERAL ATTACK.** — Where the judgment entry of a court of general jurisdiction is silent as to jurisdiction, the entire record may be looked to, and if it affirmatively appears therefrom that it did not exist, the judgment is void in collateral as well as direct proceedings, and between all persons. *Id.*
13. **JUSTICE'S JUDGMENT — COLLATERAL ATTACK.** — In a collateral proceeding, and in the absence of recitals, every presumption in favor of justice's judgments will be indulged, and they will not be deemed void merely because every fact necessary to give the court jurisdiction does not affirmatively appear in the record. When the record is silent, jurisdiction will not be conclusively presumed, and evidence tending to show that defendant was not served with notice will be admitted. *Id.*
14. **JUSTICE'S JUDGMENT AS RES JUDICATA.** — A judgment rendered by a justice of the peace in an action under the landlord and tenant act, deciding that the relation of landlord and tenant did not exist, and that no

- rent was in arrear, is, until reversed or regularly set aside, a complete bar to another proceeding before another justice upon the same cause of action. *Marsteller v. Marsteller*, 604.
15. JUDGMENT AS RES JUDICATA. — The judgment of a court of competent jurisdiction, whether of record or not, and whether in a proceeding according to the course of the common law, or summary in its character, if upon a point litigated by the parties, is conclusive in all subsequent suits directly involving the same question, until reversed or legally set aside. An exception to this rule exists in an action of ejectment on a legal title in which successive suits may be prosecuted until two concurring judgments are obtained. *Id.*
16. RES JUDICATA. — WHERE A CONTRACT IS PAYABLE IN INSTALLMENTS, and the court, in an action to recover one of such installments, determines that the contract is divisible, that a separate action may be prosecuted for each installment, though other installments were due when such action was commenced, such determination is conclusive upon the parties with respect to the character and construction of the contract, and estops them from subsequently insisting that successive actions may not be brought and independent judgments recovered, even for installments that were due and not in the suit when the action to recover one thereof, without including the others, was commenced. *Lorillard v. Clyde*, 470.
17. RES JUDICATA. — A judgment rendered on the merits is co-extensive with the issues upon which it is founded, and is conclusive between the parties thereto, not only as to the matters actually proved, argued, and submitted for decision, but also as to every other matter directly at issue by the pleadings, which the defeated party might have litigated. *Id.*
18. RES JUDICATA. — WHILE PAROL EVIDENCE MAY BE RECEIVED TO SHOW what was litigated at the trial, it must be consistent with the record, and cannot be admitted to contradict it. Hence it is proper to exclude evidence tending to show that upon the trial of a former action no testimony was offered in support of a defense, when there is no offer to show that such defense was waived, withdrawn, or struck from the record, and the record in the former action shows that the defendants requested the trial judge to find in their favor upon such defense. *Id.*
19. IMPEACHMENT. — So long as a judgment is correct, it cannot be impeached by showing that the court proceeded upon erroneous principles in reaching its conclusion. *Borden v. Croak*, 23.
20. MOTIONS TO VACATE. — Under section 68 of the Practice Act of Nevada, authorizing courts to grant relief against judgment obtained against a party through his mistake, inadvertence, or excusable neglect, relief cannot be granted to a party on whom summons has been personally served, and the service of process on the managing agent of a corporation is a personal service on the corporation itself. *Lang Syne Gold-Mining Co. v. Ross*, 357.
21. RELIEF AGAINST, IN EQUITY. — An averment in a complaint seeking relief against a judgment, that the plaintiff against whom the judgment was rendered was not indebted to the defendant in any sum whatever, is a sufficient statement of a meritorious defense to the original action. *Id.*
22. RELIEF AGAINST, IN EQUITY. — Though a part of the sum for which a judgment was rendered was justly due, a court of equity will grant relief

- if such judgment was procured through fraud and conspiracy, and was for a much larger sum than was due. *Id.*
23. NOTICE OF FRAUD IN PROCURING. — When one knows that the pendency of an action and the service of summons therein have been concealed from the defendant, he is sufficiently put on inquiry as to the defendant's rights; and if he becomes a purchaser at an execution sale based upon a judgment recovered in such action, he is not entitled to the rights of an innocent purchaser. A complaint seeking relief from such judgment, and the sale made thereunder, need not affirmatively allege that such purchaser knew that the judgment defendant had a meritorious defense to the action. *Id.*
24. MISNOMER NULLIFYING. — Marriage confers on the woman the surname of her husband, and a citation by publication requiring "Mary E. Robinson," defendant's maiden name, to be cited and to appear in an action is not sufficient to give the court jurisdiction to render a binding judgment against "Mary E. Freeman," the name that defendant acquired by marriage. *Freeman v. Hawkins*, 769.
25. DESCRIPTION OF PROPERTY IN A DECREE OF SALE. — A decree directing the sale of a parcel of land, except such parcels as have before been laid out in town lots by James Roach, and have been sold and conveyed prior to the execution of a designated mortgage, is invalid for want of description, when there is nothing in the record furnishing data by which to ascertain what tracts had been laid out in town lots and sold and conveyed. *Doson v. Wickersham*, 166.
26. JUDGMENT BY DISQUALIFIED JUDGE, EFFECT OF. — A judgment or decree rendered by a judge who by statute is disqualified to sit in the case because of his relationship to one of the parties is void, and may be collaterally attacked. *Horton v. Howard*, 198.
27. JUDGMENT BY DISQUALIFIED JUDGE, WHO MAY ATTACK. — A party against whom a judgment or decree has been rendered by a judge disqualified to sit in the case because of his relationship to one of the parties, and who has neither appeared nor consented to the exercise of judicial functions by the disqualified judge, is not estopped from questioning its validity in a collateral proceeding. He need not contest its validity by appealing from the decree. *Id.*
28. JUDGMENT BY DISQUALIFIED JUDGE, WHO MAY ATTACK. — The grantee of a purchaser under a foreclosure decree void by reason of the disqualification of the judge on account of his relationship to one of the parties to the suit at the time that the decree was rendered and the deed signed by such judge, but who does not rely upon the title thus acquired, and who is also the grantee of subsequent purchasers at foreclosure sales of the same property, is not estopped from collaterally attacking the validity of such decree. *Id.*
29. JUDGMENT BY CONFESSION — ATTACKING FOR FRAUD. — A judgment by confession is a final judgment, and in the absence of irregularity, cannot be attacked for fraud by motion in the cause. Such attack can be made only by bringing an independent and separate action. *Sharp v. Danville etc. R. R. Co.*, 533.
30. JUDGMENT BY CONFESSION. — A CORPORATION MAY, in a proper case, and by its authorized officers, confess a judgment, the same as a natural person, by complying with all the essential requirements of the statute. *Id.*
31. JUDGMENT BY DEFAULT IS PROPERLY SET ASIDE on the ground of surprise and excusable neglect, when such judgment was entered through

the failure of counsel to act, after being engaged by defendant to enter a plea for him, and left in attendance upon the court. The counsel's laches as to his duty to enter an appearance and file proper pleadings cannot be attributed to defendant, and allowed to prejudice him. *Taylor v. Pope*, 530.

22. **NONSUIT.** — In reviewing a motion for nonsuit, the plaintiff is entitled to every reasonable inference of fact that the jury might have drawn from the evidence, and every relevant fact which it tends to prove is to be considered as admitted. Therefore, when such evidence tends to establish a *prima facie* case, it is error to enter a judgment of nonsuit. *Corballis v. Township of Newberry*, 588.
23. **NONSUIT — NEGLIGENCE OF TOWNSHIP.** — In an action against a township for negligence, where the evidence shows that it failed to keep the approaches to a bridge in proper repair, thereby creating a pitfall causing an injury to a traveler along the highway, without his fault, a *prima facie* case is established, and it is error to order a judgment of nonsuit. In such case it is within the province of the jury to weigh the evidence and determine the facts. *Id.*

See **DEEDS**, 13; **EVIDENCE**, 5; **FRAUDULENT CONVEYANCES**, 6, 7; **JUDICIAL SALES**; **LIMITATIONS OF ACTIONS**.

JUDICIAL SALES.

JUDGMENT AND JUDICIAL SALE, DESCRIPTION OF PROPERTY IN. — Where one claims through a judicial sale, it must appear from the decree and deed through which he claims that the title to the property claimed is in him. If the decree and deed are so defective that it cannot be ascertained by inspection or from *data* which they furnish what property was in fact sold, or if, in order to ascertain the intention of the officer in selling, it becomes necessary to institute an extrinsic inquiry, the deed is void, if uncertain. *Bowen v. Wickersham*, 106.

See **FIXTURES**; **JUDGMENTS**, 25; **TAXATION**, 5-7; **TRUSTS AND TRUSTEES**, 7-12.

JURISDICTION.

See **JUDGMENTS**; **MARRIAGE AND DIVORCE**, 6; **TAXATION**, 1.

JURY AND JURORS.

See **INNKEEPERS**, 4; **TRIAL**.

JUSTICES OF THE PEACE.

See **JUDGMENTS**, 13-15.

LANDLORD AND TENANT.

1. **LIEN ON AFTER-ACQUIRED PROPERTY — BURDEN OF PROOF.** — If a landlord is seeking to enforce a lien for rent on the goods of his deceased tenant, under a provision in the lease not covering subsequently acquired property, the burden of establishing the lien is upon the landlord; and in the absence of proof that the tenant was the owner of the goods at the time he took the lease, it will be assumed that they are all after-acquired property. *Borden v. Croak*, 23.
2. **LIEN ON AFTER-ACQUIRED PROPERTY.** — Where an attempt is made by a clause in a lease to create a valid and first lien for rent "upon the prop-

erty of the person liable therefor," but no particular property or class of property is described, nor the description limited to personal property, the lien is void for uncertainty of description, when applied to property owned at the time, and *a fortiori* void when applied to after-acquired property. *Id.*

3. LIEN — WHEN GOVERNED BY RULES APPLICABLE TO CHATTEL MORTGAGES. — A lien for rent created by lease, and claimed on property left in the possession of the tenant, is in the nature of a mortgage, rather than of a pledge, and is governed by the rules of law applicable to chattel mortgages. *Id.*

4. LANDLORD CANNOT ESCAPE LIABILITY FOR EXISTING NUISANCE BY LEASING THE PROPERTY on which it exists to a tenant, and putting him in possession. And where the nuisance complained of consists of the use of a defective cess-pool by the tenant, the latter's liability for such use cannot take the place of or in any manner affect that of the landlord, if the cess-pool was not properly built, or was out of repair when the tenant was put in possession. But if the cess-pool was properly built, and in good repair when the tenant took possession, the landlord will not be liable for the consequences of the tenant's neglect to keep it in repair. *Wunder v. McLean*, 702.

See REAL PROPERTY, 1, 2.

LEGACIES.

See WILLS.

LIBEL AND SLANDER.

1. OFFICE OF INNUENDO IN ACTION FOR LIBEL. — In an action for libel, the office of the innuendo is to define the defamatory meaning which the plaintiff sets upon the words; to show how they come to have that meaning, and how they relate to the plaintiff. If they are capable of the meaning he ascribes to them, it is for the jury to say whether or not they were used in that sense. *Price v. Conway*, 704.

2. SPECIAL DAMAGE NEED NOT BE ALLEGED IN DECLARATION FOR LIBEL WHEN. — Any written words which have a tendency to injure a person in his or her office, profession, calling, or trade are libelous, and in an action therefor it is not necessary for the declaration to contain an averment of special damage. *Id.*

See ASSAULT, 2.

LICENSES.

See MUNICIPAL CORPORATIONS, 8-11; TAXATION, 2.

LIFE INSURANCE.

See INSURANCE, 24-31.

LIENS.

LIEN ON AFTER-ACQUIRED PROPERTY. — If it is the intention of the parties creating a lien on personal property that it shall extend to after-acquired property, such intention must be clearly expressed. *Borden v. Croak*, 23.

See JUDGMENTS, 1-4; LANDLORD AND TENANT, 1-3; MECHANIC'S LIEN; MORTGAGES; PROCESS, 5; SALES, 1; TRUSTS AND TRUSTEES, 5, 6; VENDOR AND VENDEE, 4.

LIMITATIONS OF ACTIONS.

JUDGMENT, RELIEF FROM. — STATUTE OF LIMITATION declaring the time within which action shall be commenced for relief on the ground of fraud applies to actions for relief from judgment obtained by fraud and conspiracy; and if commenced within the time therein limited, an action cannot be treated as barred by laches. *Lang Syne Min. Co. v. Ross*, 337.

LIS PENDENS.

1. If a wife, in an action for divorce and alimony, definitely describes certain real estate of her husband in her petition, and asks that it be set apart to her as permanent alimony, the doctrine of *lis pendens* applies, and a purchaser of the land *pendente lite* is bound by the judgment subsequently rendered therein. If, in such action, no specific property is pointed out, but only a general prayer for alimony, the doctrine would not apply. *Wilkinson v. Elliott*, 158.
2. Before the doctrine of *lis pendens* will be applied to a purchaser, the petition in the suit must be actually filed and made a permanent record, with the *bona fide* intention of proceeding with the action. The mere handing of the petition to the proper officer for indorsement, and for a temporary purpose, and the immediate withdrawal of it without the issuance of summons thereon, is not a filing so as to commence the action within the meaning of the statute. *Id.*
3. **DIVORCE.** — If a wife who asks for a divorce describes in the complaint the property of her husband, and asks to have it set aside to her for her support, the rule of *lis pendens* can be invoked by her against one who purchases during the pendency of the action, and with notice thereof. *Powell v. Campbell*, 350.
4. **LIS PENDENS IS NOTICE OF ALL FACTS APPARENT** on the face of the plea, and of those other facts of which the facts so stated necessarily put the purchaser on inquiry. *Id.*
5. **ESTOPPEL.** — The fact that a wife, during the pendency of a suit for divorce, told her husband that he could sell certain property if he wished to cannot limit the effect of a decree subsequently rendered in that suit, setting aside such property to her, nor can it entitle a purchaser from the husband, with notice of the suit, to retain the property, if it has been set aside to the wife, there being no claim that such purchaser knew of or acted upon the alleged assent of the wife that her husband might sell. *Id.*
6. **PARTIES DEFENDANT.** — In an action to set aside a deed made by a husband pending a suit for a divorce, the husband is not a necessary party defendant if a decree has been entered in a divorce suit vesting the title in his wife, and the purchaser of the property (who was the defendant in the present action) purchased of the husband with actual notice of the pendency of the suit, and that a part of the relief therein sought was the setting aside to the wife of the property in controversy. *Id.*
7. **LIS PENDENS, COMPELLING CONVEYANCE OF PROPERTY BOUGHT SUBJECT TO.** — Though a purchaser of property pending a suit against the vendor for a divorce takes the property subject to the final decree in such suit, and though such decree purports to vest the title in the wife, still she may maintain an action against such purchaser to compel him, by his conveyance, to vest an unquestionable legal title in her. *Id.*

MANDAMUS.

See OFFICE AND OFFICERS, 1.

. MANSLAUGHTER. .

See CRIMINAL LAW, 24-30.

MARRIAGE AND DIVORCE.

1. EFFECT OF ANNULMENT OF DECREE OF DIVORCE FOR FRAUD in its procurement is to restore the parties to their matrimonial relations as they stood before the decree was pronounced. *Voorhees v. Voorhees*, 404.
2. ESSENTIALS OF VALID MARRIAGE are capacity and consent. *Id.*
3. COHABITATION AND REPUTATION DO NOT CONSTITUTE MARRIAGE, but are only evidence tending to raise a presumption of marriage, from circumstances. In any case, the cohabitation must not be meretricious, but matrimonial, to raise the presumption. *Id.*
4. MARRIAGE IS A CIVIL CONTRACT, AND NO CEREMONIAL is indispensably requisite to its creation. A contract of marriage made *per verba de presenti* is a valid marriage. *Id.*
5. WHERE ACTUAL MARRIAGE IS SHOWN, whether legal or illegal, the subsequent cohabitation and reputation of the parties must be regarded as having their origin in such marriage, and cannot be treated as creating a presumption that the parties contracted a subsequent marriage at a later date. *Id.*
6. DIVORCE — JURISDICTION. — THE COURTS OF THIS STATE HAVE JURISDICTION in a suit for divorce, the cause for which occurred in another state, if the plaintiff has resided in this state for one year next preceding the filing of his complaint, and has not acquired such residence for the purpose of obtaining a divorce under its laws. *Jones v. Jones*, 299.
7. CRUELTY FROM INTOXICATION AS DESERTION BY HUSBAND. — Where the failure of the husband to provide for the wife, and his persistent and long-continued cruel treatment of her, caused by his voluntary and habitual intoxication, is such as to render her existence miserable, and to actually endanger her life, such treatment amounts to desertion on his part, and if he continues his habits of intoxication for the statutory period after separation, the right of the wife to absolute divorce for his desertion becomes fixed. *McVickar v. McVickar*, 422.
8. DRUNKENNESS AS CRUELTY. — The voluntary and habitual drunkenness of the husband will not excuse his cruelty to his wife, although the cruelty was the direct result of the drunkenness. Cruelty so caused is ground for divorce. *Id.*
9. DESERTION. — A woman who leaves her husband because it is unsafe for her to cohabit with him, and under such circumstances as to make him the deserter, does not consent to the desertion; and if he does not, before the lapse of the statutory period, amend his habits so as to render it safe for his wife to resume cohabitation, her right to a divorce becomes fixed. *Id.*
10. DESERTION. — Where a husband's treatment of his wife is so cruel and long-continued and persistent as to render separation desertion on his part, and his conduct subsequently is such as to render it unsafe for her to return to him at any time within three years after the separation, her right to divorce then becomes fixed. *Id.*
11. DIVORCE FOR DESERTION. — Where the husband's cruelty is not of such intensity as to amount to desertion, but is such as will justify his wife in temporarily separating herself from him, it is his duty to personally seek

her and ask her to return; and his failure to do this, while he remains passive for many years, manifesting no interest in her welfare or desire to resume marital relations after reforming his habits, constitutes desertion, and entitles the wife to divorce. *Id.*

12. **POWER OF COURT TO VEST TITLE OF HUSBAND'S PROPERTY IN WIFE.** — Under a statute declaring that on the granting of a divorce the court may set apart such portion of the husband's property for the support of the wife and children as shall be deemed just and equitable, the court may decree that the title to a portion of the husband's separate estate, real or personal, or both, be vested in the wife. *Powell v. Campbell*, 350.

See JUDGMENTS, 24.

MARRIED WOMEN.

See DEEDS, 4; HUSBAND AND WIFE; MARRIAGE AND DIVORCE.

MASTER AND SERVANT.

1. **MASTER IS CIVILLY LIABLE FOR TRESPASS OF HIS SERVANT WHEN.** — A master is not liable for the independent trespass of his servant, not done in the course of the service. But the master is civilly liable for the manner in which his servant does the work he is employed to do, although the manner in which he does it is contrary to the instructions given him by his master. It is the character of the employment, and not the private instructions given by the master to his servant, that must determine his liability. Where, therefore, a master, claiming to own an organ in the possession of another, sends his servants to the latter's house to remove the organ therefrom, and the servants enter and take the organ by force and violence, the master will be liable for their trespass, although in committing it they violated his express instructions. *McClung v. Dearborne*, 708.
2. **MASTER IS RESPONSIBLE IN PUNITIVE DAMAGES FOR THE WILLFUL ACT OR GROSS NEGLIGENCE OF HIS SERVANT** injured in his business, whether he did or did not know the servant to be incompetent or disqualified for the service in which he was engaged. *Southern Express Co. v. Brown*, 306.
3. **UNDER-SERVANT.** — THE FACT THAT THERE IS AN INTERMEDIATE PARTY IN WHOSE GENERAL EMPLOYMENT the person whose acts are in question is engaged does not prevent the principal from being held liable for the negligent conduct of his subagent or under-servant, unless the relation of such intermediate party to the subject-matter of the business in which the servant is engaged is such as to give him exclusive control of the manner and means of its accomplishment, and exclusive direction of the persons employed therefor. *Id.*
4. **WHERE AN EXPRESS COMPANY EMPLOYS** a local agent who employs a driver, and furnishes a horse and supplies feed therefor, the driver may be regarded as a sub or under servant of the company, for whose gross negligence it is liable to one injured thereby. *Id.*
5. **LIABILITY OF MASTER TO INDEMNIFY SERVANT FOR DAMAGES RESULTING FROM LATTER'S VIOLATING INJUNCTION BY FORMER'S ORDER.** — Where a servant of a corporation upon which an injunction has been served, restraining it from doing certain acts, does those acts by order of the corporation, which imparts to him no notice of the injunction, but conceals its existence from him, the corporation is bound to indemnify him

for the damages sustained by him as the natural result of his obedience to its orders; nor does its liability depend upon the ultimate determination of the question as to which of the contending parties is legally right in respect to the title of disputed property, or the legality or propriety of the injunction order, or the sufficiency of the service thereof. A master may not expose his servant to danger of loss or injury in the execution of orders, the risk of which is known to him, but of which he wrongfully withholds notice from the servant. *Guirney v. St. Paul etc. Ry Co.*, 256.

6. IT IS THE DUTY OF THE MASTER TO EXERCISE ALL REASONABLE CARE to provide and maintain safe, sound, and suitable machinery and other instrumentalities, and not to expose his employees to risks beyond those which are incidental to the employment and in contemplation at the time of the contract of service, and an employee has the right to presume that these duties have been performed. *Richmond etc. R. R. Co. v. Williams*, 876.

7. DUTIES OF MASTER. — The master must make such regulations and provisions for the safety of his employees as will afford them reasonable protection against dangers incident to the performance of their respective duties. His duty extends to the selection of competent persons to whom he may delegate his authority to take charge of and control the business in which the servants are employed. *Harrison v. Detroit etc. R. R. Co.*, 180.

8. IF A BRAKEMAN IN THE SERVICE OF A RAILROAD CORPORATION IS INJURED BY A LADDER being broken, and by the conductor starting the train in motion under such circumstances as to imperil the life of the brakeman and to injure his person, he is entitled to recover of the corporation compensation for the injury suffered, if the dangerous character of the cars and the position of the brakeman were known to the conductor. *Richmond etc. R. R. Co. v. Williams*, 876.

9. CONTRIBUTORY NEGLIGENCE. — A servant cannot recover damages from his master for injuries received in falling through a trap-door in the latter's mill, when he has provided a safe cover therefor, given orders that it be kept in place, and has had it nailed to the floor to prevent accident; for in the absence of evidence that it was left uncovered by the master, or with his knowledge, or that it had remained uncovered long enough before the accident for him to have known it in the exercise of reasonable care, no negligence can be imputed to him. *Clough v. Hoffman*, 620.

10. CONTRIBUTORY NEGLIGENCE. — Where a safely constructed trap-door is maintained in an imperfectly lighted hallway of a manufactory, as a necessary means for one of the employees to reach a portion of the building, and such employee has strict orders to keep it closed, while the other employees have full knowledge of its existence and use, the master is not guilty of such negligence as will make him liable to an employee who, knowing that such door has been lately used, and while passing rapidly along the hallway, falls through the opening and is injured in consequence of the failure of the other employee to close the door after using it. In such case the injured employee is guilty of such contributory negligence in failing to look and see if the door is open as will bar his right to recover. *Pawling v. Hoskins*, 617.

11. LIABILITY OF RAILROAD COMPANY FOR ACT OF VICE-PRINCIPAL. — A train-master who has control of all trains, employees, and everything

which goes upon the track on his division, has such relation to the railway company that he is deemed its representative; and if he violates rules made for the government and protection of employees, by inviting third persons to ride on hand-cars, thus placing them, while they are ignorant of such rules, in a position where they are injured by the negligence of the company's servants, the company must respond in damages for the injury thus resulting. *International etc. R'y Co. v. Prince*, 795.

12. **MASTER'S LIABILITY FOR NEGLIGENCE OF AGENT OR VICE-PRINCIPAL.** — When a master appoints a middleman or agent with full power to employ and discharge those under him, and with full and absolute control of the work, the master is liable for his negligence. *Harrison v. Detroit etc. R. R. Co.*, 180.
13. **WHO ARE FELLOW-SERVANTS.** — Where parties are fellow-servants while engaged in the business of a natural person, they should be so considered when engaged in the business of a corporation; and if one is the agent or superior servant while engaged in the business of a corporation, and through his negligence another engaged in the same business is injured, and for whose injury the corporation is liable, then, under like circumstances, if it was the business of a natural person, the master should be held liable. *Id.*
14. **WHO ARE FELLOW-SERVANTS.** — Whether or not persons employed in a common enterprise are fellow-servants is not to be determined solely from the grade or rank of the offending or of the injured servant. It is to be determined by the character of the act being performed by the offending servant. If it is an act that the law imposes on the master to perform, then the offending employee is not a fellow-servant, but a superior or agent, for whose acts the master is liable to his servants. *Id.*
15. **WHO ARE FELLOW-SERVANTS.** — When the master has delegated to a servant the care and management of the entire business, or a distinct department of it, and has charged him with the performance of duties toward an inferior servant, which the law imposes upon the master, then the superior servant stands in the place of the master, and the rule *respondent superior* applies. *Id.*
16. **WHO ARE FELLOW-SERVANTS.** — Whether or not one servant has power to employ and discharge other servants is an important element in determining whether or not he is a superior servant for whose acts the master is liable; for when the offending servant has power to employ and discharge servants, and to direct and control the injured servant, and orders him to do an act within the scope of his employment, thereby exposing him to a risk not contemplated in his contract of service, and causing his injury, or where the master has charged one servant with the sole duty of providing proper materials and appliances for carrying on the work, and another servant is injured by the neglect of the former servant, the master is liable to the injured servant for injuries received while acting under the orders of the superior servant. *Id.*
17. **ROAD-MASTER AND SECTION-HAND NOT FELLOW-SERVANTS.** — A road-master who has general charge of a division of a railroad and of the section-hands at work thereon, with power to employ and discharge them, is not their fellow-servant, but is the representative of the company, which is responsible for his negligence in the performance of the duties delegated to him. *Id.*
18. **FELLOW-SERVANTS, WHO ARE.** — All employees of a railway company engaged in the operating service connected with the business of running

trains are fellow-servants. Hence a hostler or yard-servant, whose duty it is to supply locomotives, before starting on the road, with water, sand, and other needful things, is a fellow-servant of a brakeman, and the latter cannot recover for injuries sustained from the failure of the former to provide the locomotive with sand or needful supplies. *Louisville etc. R'y Co. v. Petty*, 304.

19. FELLOW-SERVANTS. — CONDUCTOR IN CHARGE OF A RAILWAY TRAIN, AND A BRAKEMAN whose duty it is to obey his orders, are not fellow-servants, and the latter may therefore recover of their common employer for injuries suffered through the negligence of the former. *Richmond etc. R. R. Co. v. Williams*, 876.
20. NEGLIGENCE OF FELLOW-SERVANTS. — The engineer in charge of an engine which furnishes the power for a stationery manufactory is the fellow-servant of the foreman of the composing-room of the same, and the latter cannot recover damages for an injury received in consequence of the negligence of the former. *Pawling v. Hoskins*, 617.
21. LIABILITY FOR NEGLIGENCE OF FELLOW-SERVANT. — The master is not liable for injuries personally suffered by his servant through the negligence of his fellow-servant acting as such while engaged in the common employment, unless the master is chargeable with negligence in the selection of the servant in fault, or in retaining him after notice of his incompetency. *Harrison v. Detroit etc. R. R. Co.*, 180.
22. LIABILITY FOR NEGLIGENCE OF SUPERIOR SERVANT. — When a superior servant orders one under him to perform work differing from that for which he is employed, and which results in injury, the superior is guilty of an abuse of authority, and the master is liable. *Id.*
23. FELLOW-SERVANTS. — When the negligence of a railroad fireman or engineer in failing to ring the bell on the engine is the immediate and proximate cause of an injury to a section-hand, the latter cannot recover, as the parties are fellow-servants. *Id.*
24. CONTRIBUTORY NEGLIGENCE OF SERVANT. — A servant cannot recover damages for the negligence of his superior servant, if he was aware of a danger which the superior servant did not apprehend, and being aware of it, did not seek to save himself from injury; and the fact that he was ordered to continue work would not justify him in doing so in the face of danger which was apparent to him. *Id.*
25. NEGLIGENCE OF MASTER OR SUPERIOR SERVANT. — Where a peculiar risk, commanded by the master or a superior servant, is not obvious, an inferior servant has a right to assume that he is not being put in peril, and is not bound to investigate the risk before obeying his orders. He need not set up his own judgment against that of his superiors, but may rely upon their advice, and still more upon their orders, notwithstanding many misgivings of his own. *Id.*
26. NEGLIGENCE OF MASTER — SPECIAL RISKS. — When the master directs the servant to do some dangerous act which could be made safe by special care on the part of the master, the servant may assume that such special care will be taken; and failing to exercise such care, the master is liable. *Id.*
27. NEGLIGENCE OF MASTER — LIABILITY FOR ACTS OF HIS AGENT. — When a master places the entire charge of his business, or of a distinct branch of it, wholly in the hands of an agent, exercising no discretion and no oversight, the neglect of the agent in exercising ordinary care in the business of the master is a breach of duty for which the master is liable. *Id.*

28. **NEGLIGENCE OF FELLOW-SERVANTS**. — A master is not liable to a servant for the neglect of his fellow-servant in doing or omitting to do a portion of the common work. This rule will not relieve the master, whether a corporation or a natural person, from the duty and obligation to servants to furnish safe machinery or other apparatus, and to observe all the care which the exigencies of the situation reasonably require, as well as to employ competent servants. *Id.*
29. **RAILWAY COMPANY FAILING THROUGH THE NEGLIGENCE OF ONE OF ITS EMPLOYEES** to provide a locomotive with sand, with which to sand the track and prevent the cars from slipping, is not liable to a brakeman injured thereby, for the reason that his injury is the result of the negligence of a fellow-servant. *Louisville etc. R'y Co. v. Petty*, 304.
30. **NEGLIGENCE OF A FELLOW-SERVANT DOES NOT RELIEVE A MASTER** from liability to a co-servant for an injury which would not have happened had the master performed his duty. *Coppins v. New York etc. R. R. Co.*, 523.
31. **RAILWAY CORPORATION OWES A DUTY TO ITS SERVANTS**, so far as reasonable care can accomplish it, to employ competent men in the management of its road. *Id.*
32. **A SERVANT IS NOT COMPETENT WHEN HE CANNOT BE RELIED UPON** to execute the rules of his master, unless prevented by causes beyond his control. Incompetency exists not only in physical or mental attributes, but in the disposition with which the servant performs his duties. If he habitually neglects them, he must be regarded as incompetent, though he is physically and mentally able to do well all that is required of him. *Id.*
33. **WHERE A SERVANT IS IN THE HABIT OF NEGLECTING HIS DUTY**, and such negligence is known, or by the exercise of reasonable diligence would have been known, to the master, the latter is liable for injuries resulting from such negligence. *Id.*
34. **MASTER'S LIABILITY FOR INJURY TO SERVANT**. — If a SWITCHMAN HABITUALLY NEGLECTS HIS DUTIES by absenting himself from his post at times when he ought to be there to signal passing trains, and leaves a switch open when he supposed he had closed it, and his mistake would have been discovered in time to prevent an accident had he been at his post when the next train was expected to pass, and he, from his absence, failed to discover such mistake, whereby the train was derailed and a brakeman injured, the latter may recover of the railroad company damages suffered by him from such accident. *Id.*

See AGENCY; COUNTIES, 2; LIE PENDENS, 1-7.

MECHANIC'S LIEN.

1. **MECHANIC'S LIEN, TIME TO FILE, NOT EXTENDED BY WORK DONE TO COMPENSATE FOR DEFECTIVE PERFORMANCE OF CONTRACT**. — The time for filing a mechanic's lien is not extended by the doing of work or the furnishing of material to compensate for a deficiency in the work done and material furnished and charged for more than six months previously. *Harrison v. Homoeopathic Ass'n*, 714.
2. **MATERIAL-MAN CANNOT FILE MECHANIC'S LIEN FOR PORTABLE LAUNDRY STOVE** not used or intended to be used as a part of the building, but an ordinary piece of personal property, as much adapted for use in one laundry as in any other, notwithstanding the fact that it was furnished to the contractor under a contract which included materials for the construction of the building. *Id.*

3. **SUBCONTRACTOR CANNOT FILE LIEN WHEN.** — Where the principal contractor for the erection of a building stipulates in his contract that he will, upon its completion, deliver the building to the owner, free from all liens and encumbrances, a subcontractor cannot file a lien against the building for work done or materials furnished by him in its erection. The subcontractor is charged with knowledge of all the terms and stipulations of the contract between the owner and the principal contractor, and is bound by them. *Schroeder v. Galland*, 691.
4. **SUBCONTRACTOR CANNOT FILE MECHANIC'S LIEN AGAINST BUILDING**, where the principal contractor has, in his contract with the owner, stipulated not to permit any liens to be filed against the building; and the fact that subsequent alterations in the plan of the building were made by the owner and builder is of no consequence as to the question of the right of the subcontractor to file a lien. *Benedict v. Hood*, 698.
5. **EXECUTION OF BOND, WHAT IS A SUFFICIENT.** — Where a subcontractor, joining in a bond to the owner of a building for the faithful performance, by the principal contractor, of the covenants and agreements of the original contract, does not sign his name at the foot of the bond, but writes his name in the blank at the head of the bond, left for the names of the obligors, this is a good execution of the bond as to him; and the fact of his joining in the bond is proof conclusive that he had notice of the contents of the principal contract, and agreed to the performance of all its terms. *Id.*

MISNOMER.

See JUDGMENTS, 24.

MORMONS.

See ELECTIONS, 2, 3.

MORTGAGES.

1. **WASTE BY MORTGAGOR IN POSSESSION OF REAL ESTATE WILL NOT BE ENJOINED**, unless the acts complained of are such as may render the security insufficient for the satisfaction of the debt, or of doubtful sufficiency. The mortgagee is, however, entitled to have the mortgaged property preserved as sufficient security for the payment of his debt, and it is not enough that its value may be barely equal to the debt. *Moriarty v. Ashworth*, 203.
2. **REMEDY OF MORTGAGEE FOR REMOVAL OF PERSONAL PROPERTY.** — Where a mortgage is regarded as a conveyance of the legal title to the property, giving the mortgagee a right of possession, his legal ownership and actual or constructive possession give him the right to follow and recover personal property severed from the mortgaged premises; but where the mortgage is regarded merely as security, and the mortgagor has the right of possession until ejectment or foreclosure, the mortgagee has merely the right to restrain the removal of such property by injunction, to protect his lien; or, after removal, to recover damages of the mortgagor for the wrongful diminution of his security. *Verner v. Betts*, 387.
3. **RIGHT OF MORTGAGOR TO SELL PERSONAL PROPERTY.** — Where the mortgagee holds title under the mortgage only as security for his lien, the mortgagor in possession is the owner of the personal property on the mortgaged premises, as to innocent third parties, and he may sever and

- sell it, until restrained by injunction, ejected by entry, or barred by foreclosure. *Id.*
4. MORTGAGEE MAY AT ANY TIME have the security of his lien protected by injunction against the severance of personal property from the mortgaged realty. *Id.*
 5. TITLE OF BONA FIDE PURCHASER OF BUILDING SEVERED FROM MORTGAGED REALTY. — Where a building situated on mortgaged realty, and subject to the mortgage, is severed and sold by the mortgagor in possession, having the legal title, to an innocent purchaser, the mortgagee's lien in equity is gone, and his only remedy is by action at law against the mortgagor to recover damages for impairing his security. *Id.*
 6. FORECLOSURE. — HOLDERS OF OUTSTANDING TAX LIENS MAY BE BROUGHT IN, and their validity determined, in an action to foreclose a mortgage. *Broquet v. Warner*, 124.
 7. FORECLOSURE SALE, EFFECT OF, BY RELATION. — Upon a foreclosure sale, the purchaser takes the title of the mortgagor as of the time when the mortgage lien was created. *Batterman v. Albright*, 510.
 8. WHERE NURSERY-TREES ARE GROWN UPON MORTGAGED PREMISES, a sale and conveyance made under the foreclosure of the mortgage passes to the purchaser the title to such trees, as against a person claiming under an execution sale against the mortgagor under a levy which is subsequent to the lien of the mortgage. *Id.*
 9. FORECLOSURE OF A MORTGAGE IS NOT SUBJECT TO COLLATERAL ATTACK because an assignee of part of the mortgage debt was not a party thereto. *Id.*
 10. FORECLOSURE OF MORTGAGE, PARTIES TO. — One who has purchased nursery-trees under an execution against a mortgagor appears not to be a necessary party to the foreclosure of a mortgage previously made upon the lands upon which the trees grew; and upon the making of a conveyance to the purchaser under the sale pursuant to such foreclosure, his title to such trees as remain on the premises is paramount to that of the purchaser at the execution sale. *Id.*

See CHATTEL MORTGAGES; JUDGMENTS, 1; PARTNERSHIP, 1; SALES, 1.

MUNICIPAL CORPORATIONS.

1. WHAT IS NOT. — A local corporation, created to serve municipal purposes, but which is not the direct representative of the people of its locality, is in no sense a municipal corporation. *O'Leary v. Board of Comm'rs*, 169.
2. MUNICIPAL CORPORATION POSSESSES, IN ADDITION TO THE POWERS SPECIFICALLY CONFERRED upon it by its charter, such further powers as are necessarily incident to or may be fairly inferred from those powers, including all that are essential to the declared objects of its existence. *Village of Carthage v. Frederick*, 490.
3. AN ORDINANCE ADOPTED BY A MUNICIPAL CORPORATION pursuant to authority expressly delegated to it by the legislature has the same force within the corporate limits as a statute passed by the legislature itself. If, however, the power to legislate is general or implied, and the manner of exercising it is not specified, there must be a reasonable use of such power, or the ordinance may be declared invalid by the courts. *Id.*
4. POWER TO ENACT ORDINANCES. — An ordinance making it unlawful for any owner, occupant, or person having charge of any lot to suffer or permit any snow, ice, or other obstruction to collect and remain on any

sidewalk fronting on such lots, so as to impede, obstruct, or render it dangerous to public travel, later than ten o'clock in the forenoon of any day after the same shall have fallen or collected thereon, and imposing a fine upon any one offending against such ordinance, is valid and enforceable, where the charter of the municipality authorizes it to enact ordinances to provide for keeping the sidewalks clear from ice, snow, and other obstructions, and to carry into effect the purposes of the corporation. *Id.*

6. **CONSTITUTIONAL LAW — POLICE POWER.** — The constitution presupposes the existence of the police power, and is to be considered with reference to that fact. The police power is not limited by the clause of the constitution prohibiting the taking of private property without compensation. Every citizen holds his property subject to the proper exercise of this power, either by the state legislature directly or by public and municipal corporations to which the legislature may delegate it. *Id.*
6. **CONSTITUTIONAL LAW. — A MUNICIPAL ORDINANCE REQUIRING THE OCCUPANTS OR OWNERS OF PROPERTY TO REMOVE ICE, SNOW, AND OTHER OBSTRUCTIONS** falling or collecting thereon, and imposing a penalty for their failure to do so, is a valid exercise of the police power, and is not forbidden by the clause of the constitution prohibiting the taking of private property without compensation. *Id.*
7. **POWER OF MUNICIPALITY TO DECLARE WHAT IS A NUISANCE, AND TO ABATE THE SAME.** — Where a railroad company has laid its track upon the streets of a city in good faith, and under authority of chartered rights, the city officers, by themselves, and without legal proceedings, have no right to declare it a public nuisance because the kind of rail used was not for the best interests of the city and was laid in violation of a city ordinance, and then proceed to abate it by force. By so doing they become trespassers and rioters, liable civilly and criminally as such. Where in such a case the company applies for an injunction, and the city does not ask for an adjustment of the differences between itself and the company, the injunction should be granted, without regard to the merits of the controversy. *Boston etc. R'y Co. v. City of Boston*, 658.
8. **POWER TO REGULATE DOES NOT INCLUDE POWER TO LICENSE.** — Power granted a municipal corporation by charter to restrain, regulate, and inspect houses of prostitution does not include power to license such houses by ordinance, when this power is not expressly granted, and when the charter, in express words, grants the power to license numerous other occupations. This excludes the conclusion that the power to license such houses was intended to be granted, or that it exists by implication. *Ex parte Garza*, 845.
9. **REPEALS BY IMPLICATION.** — The presumption is not lightly to be indulged that the legislature has by implication repealed, as respects a certain municipality, or all municipalities, laws of a general nature elsewhere in force throughout the state; still, a charter or special act passed subsequent to the general law, and plainly in conflict with it, will, to the extent of the conflict, operate as a repeal of the latter by implication, but such repeals are not favored, and will be applied with extreme caution. *Id.*
10. **POWER TO LICENSE OCCUPATIONS** must be plainly conferred upon a municipality, or it will be deemed not to exist. Any fair, reasonable doubt concerning the existence of the power will be resolved by the courts against the city, and the power denied. *Id.*

11. **POWER TO ENACT ORDINANCES.** — In determining the power of a municipal corporation to enact a particular ordinance, the charter by which it is claimed that such power is conferred should receive a reasonable construction, and all reasonable intendment in support of the validity of the ordinance will be indulged. *Id.*
12. **LIABILITY FOR NEGLIGENCE OF OFFICERS.** — Municipal corporations are not usually responsible in damages for the neglect of their officers, unless made so by statute, nor can such statutory liability be enlarged. *O'Leary v. Board of Comm'rs*, 169.
13. **LIABILITY FOR NEGLIGENCE OF AGENTS.** — A city engaged in constructing a work which is its private property as a municipality, and not a mere public easement, and which is done under city employment or contract, is responsible for injuries caused by neglect in its process or construction, in the same manner that it is responsible for such action directly injuring private property. *Id.*
14. **CORPORATE AGENCY, WHEN LIABLE FOR NEGLIGENCE OF SERVANT.** — An incorporated board of water commissioners, the members of which are appointed by the corporate body of the city, and the general and sole purpose of whose powers, incidentally conferred, is to examine and consider all matters relative to the water supply of such city, and which has no taxing power, and can only receive from the city the product of taxes sufficient to pay its bonds and operating expenses, and whose property is not subject to execution, is not an agency officially liable for the negligence of its servants. *Id.*
15. **OWNER OF A LOT FRONTING ON A STREET,** though he has no title in any part of the lands upon which such street is located, may sustain an action to recover damages resulting to him from an obstruction of the street impairing in a substantial degree the light or accessibility of his premises, or otherwise occasioning damage or annoyance to the occupants thereof. *Abendroth v. Manhattan R'y Co.*, 461.
16. **STREETS.** — An abutting owner, the fee of the streets being in the city, is entitled to the use of the street, and neither the legislature nor the city can devote it to purposes inconsistent with street uses, without compensation. An abutting owner on streets possesses, as an incident to such ownership, easements of light, air, and access in and from the adjacent streets, for the benefit of his abutting lands, and the appurtenant easements and outlying rights constitute private property, of which he cannot be deprived without compensation. *Id.*
17. **TAKING OF PROPERTY, WHAT IS.** — The rights of an abutting lot-owner in an adjacent street, though he has no title in the lands under such street, are private property, and the construction and operation of an elevated railway in such streets, in front of his property, is a taking of his rights for public use. *Id.*
18. **STREETS. — OPERATION OF AN ELEVATED RAILWAY IN A PUBLIC STREET IN FRONT OF PLAINTIFF'S PREMISES,** whereby a large portion of the street is filled, and the light is seriously impaired, and smoke, steam, and cinders at times are caused to enter such premises, entitles him to recover damages for the injuries thereby inflicted, though he does not have any title to any part of the street, and the construction and operation of the railway were authorized by an act of the legislature. *Id.*
19. **LACHES IN BRINGING ACTION TO RECOVER DAMAGES** sustained by the plaintiff from the erection and operation of an elevated railway on a street in front of his premises does not constitute any defense. *Id.*

MURDER.

See CRIMINAL LAW, 24-30.

MUTUAL BENEFIT ASSOCIATIONS.

See INSURANCE, 26-32.

NAMES.

See CRIMINAL LAW, 2, 3; JUDGMENTS, 24.

NAVIGABLE WATERS.

See WATERCOURSES.

NEGLIGENCE.

1. **NEGLIGENCE, WHEN SUBJECT TO LEGISLATIVE CONTROL.** — It is for the legislature to determine how far, if at all, a corporate body whose negligence is imputed, and in no sense actual, shall be made subject to action for the misconduct of its employees. *O'Leary v. Board of Comm'rs*, 169.
2. **IMPUTED NEGLIGENCE IS PURELY A QUESTION OF PUBLIC POLICY**, and subject to legislative regulation. *Id.*
3. **CONCURRENT NEGLIGENCE — LIABILITY OF EACH.** — Where an accident occurs from two causes, each due to the negligence of different persons, but together the efficient cause, then all the persons whose acts contributed to the accident are liable for a resulting injury, and the negligence of one is no excuse for the negligence of the other. *Gulf etc. Ry Co. v. McWhirter*, 755.
4. **THERE IS A DISTINCTION BETWEEN ACTIONS FOUNDED IN NEGLIGENCE** where a contract relation exists between the parties, and those in which the defendant owed to plaintiff no other duty than to use such ordinary care and caution as the nature of its business demanded to avoid injuries to others. In the latter class of cases, the mere fact that an accident happened to the plaintiff, without more, will not amount to *prima facie* proof of negligence on the part of defendant. *Cosulich v. Standard Oil Co.*, 475.
5. **ONE CONDUCTING A LAWFUL BUSINESS** is not under obligation of saving others harmless from the consequences resulting from inevitable accidents. He performs his duty when he uses reasonable care and precaution to save others from injury. *Id.*
6. **PRESUMPTION OF NEGLIGENCE DOES NOT ARISE** from evidence showing that a tank of oil in the yard of the defendant's petroleum factory exploded, igniting other oil in such yard, a quantity of which oil flowed down a pipe and set fire to plaintiff's vessel, if no contract relations exist between the plaintiff and defendant. *Id.*
7. **STORE-KEEPER AND CUSTOMER.** — Where a store-keeper, by his conduct and business, invites persons to come to his store, and to lay aside one garment to try on another, he owes a duty to exercise some care to prevent the garments so laid aside from being stolen or lost, and failing to exercise any care whatever, is answerable for the loss of such garment. *Bunnell v. Stern*, 519.
8. **A POINTED IRON FENCE FOUR FEET HIGH** erected along a sidewalk to protect an area-way and dwelling-house is a lawful structure, and the owner thereof is not liable in damages to one who, while passing along the sidewalk, slips, and in falling comes in contact with one of the points of the fence, whereby he is injured. *Kelly v. Bennett*, 594.

9. CONTRIBUTORY NEGLIGENCE OF CHILD. — In determining whether contributory negligence exists against a child, its intelligence must be considered; for the child's care must be measured by its intelligence, whether it is actor or sufferer. *Gulf etc. Ry Co. v. McWhirter*, 755.
 10. EXEMPTIONS FROM LIABILITY FOR NEGLIGENCE, CONTRACTS STIPULATING FOR, STRICTLY CONSTRUED. — Contracts stipulating for exemption from liability for negligence are not favored by the law, and in some instances, as in the case of common carriers, they are prohibited as against public policy. In all cases, such contracts should be strictly construed, with every intendment against the party seeking their protection. *Crew v. Bradstreet Co.*, 681.
 11. COMMERCIAL AGENCY LIABLE FOR NEGLIGENT PUBLICATION OF MISSTATEMENT WHEN. — A company doing business as a commercial agency is liable to a subscriber for injury occasioned to him by his relying on a misstatement as to the financial condition of a party, which it negligently prints in a book published by it for circulation among its subscribers, notwithstanding the contract between such company and the subscriber stipulates that the company shall not be liable for any loss or injury caused by the neglect or other act of any officer or agent of the company in procuring, collecting, and communicating such information, and that the company does not guarantee the correctness of such information, when the information furnished to the company by its officers and agents is correct, but the mistake is the blunder of the company in erroneously printing it in the book. *Id.*
 12. NEGLIGENCE MUST NOT ONLY BE ALLEGED AND PROVEN, but it must also be shown that it caused the injury complained of. *Robinson v. Flint etc. R. R. Co.*, 174.
 13. BURDEN OF PROOF. — He who alleges negligence as a foundation of his right to recovery must point out by evidence the defendant's fault; for the presumption is, until the contrary appears, that every man has performed his duty. *Cosulich v. Standard Oil Co.*, 475.
 14. BURDEN OF PROOF. — One seeking to recover damages for injuries which he claims to have suffered from the negligence of another must show the facts, those which relate to his share of the transaction, as well as those which relate to the defendant, and if, upon the whole case, an inference of negligence arises against the defendant, and of due care on the part of the plaintiff, he may recover. *Cincinnati etc. Ry Co. v. Howard*, 96.
 15. BURDEN OF PROOF. — When the negligence of defendant is the ground upon which a recovery in damages is sought, the burden of proof is upon plaintiff. An exception exists in the case of injury to a passenger through the negligence of a common carrier, who has the burden of proof to show that the accident was not the consequence of his own fault, but was due to causes over which he had no control. *Pasling v. Hoskins*, 617.
- See CARRIERS; COUNTIES, 3; INNKEEPERS; JUDGMENTS, 33; MASTER AND SERVANT; MUNICIPAL CORPORATIONS, 12-14; NUTRANCE; RAILROAD COMPANIES; TELEGRAPH COMPANIES.

NEGOTIABLE INSTRUMENTS.

1. PROMISSORY NOTE — CONSIDERATION. — A written promise to pay a certain sum of money at a day certain, for a consideration thereafter to be ren-

dered, is a valid promissory note, and depends for its validity upon the implied promise of the payee to furnish the consideration at the time and in the manner stipulated. *Siegel v. Chicago Trust and Sav. Bank*, 51.

2. **PROMISSORY NOTE — RECITAL OF CONSIDERATION AS AFFECTING NEGOTIABILITY.** — The mere fact that the consideration for which a note was given is recited in it, although it may appear thereby that it was given for and in consideration of an executory contract or promise on the part of the payee, will not destroy its negotiability, unless it appears through the recital that it qualifies the promise to pay, and renders it conditional and uncertain, either as to the time of payment or the sum to be paid. *Id.*
3. **NEGOTIABILITY OF NOTE** received before maturity, and before a failure of consideration, is not affected by the fact that the consideration was to be thereafter realized, or that from some contingency it might never be enjoyed. *Id.*
4. **RECITAL OF CONSIDERATION IN NOTE AS AFFECTING NEGOTIABILITY.** — Where a note recites the consideration upon which it rests, an indorsee taking it before maturity is chargeable with notice of such recital. The recital is not, however, sufficient, of itself, to advise him that there was, or necessarily would be, a failure of consideration; still, if at the time of the indorsement the consideration had in fact failed, the recital might be sufficient to put him on inquiry, and, in connection with other facts, amount to notice. *Id.*
5. **TIME OF PAYMENT OF NOTE AS AFFECTING NEGOTIABILITY.** — If the parties insert a specific day of payment in a note, it is then payable at all events, and its negotiability is not affected, although an uncertain and different time of payment is also inserted. *Id.*
6. **CONDITION IN NOTE POSTPONING TIME OF PAYMENT** until the happening of some uncertain or contingent event will destroy its negotiability; but if the maker promises to pay a sum certain at a specified day to a designated person, it is then negotiable, though it also contains a recital of the consideration upon which it is based, and the latter, if executory, may not have been performed. *Id.*
7. **IRREGULAR INDORSER OF PROMISSORY NOTE LIABLE ON HIS INDORSEMENT WHEN.** — One who indorses a promissory note drawn payable to the order of the maker before the latter has indorsed it will be liable to the holder after the maker has indorsed and negotiated it, notwithstanding the indorsement of the maker and payee is written beneath the signature of the irregular indorser. *Central National Bank v. Dreydoppel*, 713.
8. **SUIT ON NOTE — ORDER OF PROOF.** — In an action by the assignee of a note given in payment of a thrashing-machine, warranted by the seller, after the plaintiff has testified that he purchased the note before due, and without knowledge of any equities, the court may require the defendant, before offering evidence of a breach of the warranty and failure of consideration, to show that the note was either transferred after maturity, or without a valuable consideration, or taken with notice of defendant's equities. *Dreilling v. First Nat. Bank*, 126.
9. **INNOCENT PURCHASER FOR VALUE.** — If a bank discounts a note before due and places the amount to the credit of the payee, this alone will not constitute the bank a *bona fide* purchaser for value against equities; but if the payee subsequently checks against and exhausts the amount of his credit at the time the note was placed to his account, including the

amount of the note, before the bank has notice of any equities, it will be considered an innocent purchaser for value. *Id.*

See ALTERATION OF INSTRUMENTS, 1, 2.

NEW TRIAL.

1. ABSENCE OF WITNESS who has been summoned by attachment to appear at the trial is not, after conviction, ground for a new trial. It is only ground for continuance. *Reagan v. State*, 833.
2. NEW TRIAL ON GROUND OF NEWLY DISCOVERED EVIDENCE will be denied, when the record clearly shows that the evidence was accessible upon the trial by the exercise of due diligence. *Id.*
3. NEW TRIAL ON GROUND OF NEWLY DISCOVERED EVIDENCE will not be granted when such evidence was not only proper, but necessary, under the allegations of the pleadings on file at the time of the trial, and the moving party made no effort to procure it. *Waples v. Overaker*, 727.

See ASSAULT, 3; CRIMINAL LAW, 4.

NON-RESIDENTS.

See ATTACHMENT AND GARNISHMENT, 1, 4.

NONSUIT.

See APPEAL AND ERROR, 6; JUDGMENTS.

NOTICE.

See ATTACHMENT AND GARNISHMENT, 3; BONA FIDE PURCHASERS; CORPORATIONS, 12; DEEDS, 13; INNKEEPERS, 3; JUDGMENTS, 32, 33; PROCESS; REAL PROPERTY, 1, 2; SALES, 3; TAXATION, 6.

NOVATION.

See DEBTOR AND CREDITOR, 2.

NUISANCES.

1. GUNPOWDER-MAGAZINE situated so near to the dwelling-house of another as to be liable to inflict serious injury to his person or property in case of explosion is a private nuisance making the owner liable, whether the powder was carefully kept or not. *Lafin etc. Powder Co. v. Tuarney*, 34.
2. NEGLIGENCE — GUNPOWDER-MAGAZINE. — As a general rule, the question of care or want of care is not involved in an action for injuries resulting from a nuisance; consequently, if actual injury results from the keeping of gunpowder, the person keeping it will be liable, even though the explosion is not chargeable to his personal negligence. Hence it is not necessary to charge him with negligence. *Id.*
3. ALLEGATIONS. — In alleging the maintenance of a nuisance, it is not necessary to use the word "nuisance," if the facts alleged constitute a nuisance. *Id.*
4. DEFINITION. — A private nuisance is anything done to the hurt or annoyance of the lands, tenements, or hereditaments of another. Any unwarrantable, unreasonable, or-unlawful use by a person of his own property, real or personal, to the injury of another, comes within the definition, and renders the owner or possessor liable for all damages arising from such use. *Id.*

5. **ALLEGATION THAT POWDER-MAGAZINE EXPLODED** shows that it was dangerous; and an allegation that the explosion destroyed plaintiff's buildings shows that the keeping of gunpowder in the magazine, considered with reference to "the locality, the quantity, and the surrounding circumstances," constitutes it a nuisance *per se*. Hence a complaint containing these allegations is sufficient. *Id.*
6. **VIOLATION OF ORDINANCE.** — The keeping of gunpowder in a magazine in a town, in violation of an ordinance, is an illegal act, rendering the party keeping it guilty of malfeasance, and liable for all consequences resulting from the act, regardless of the question of exercise of care by the party injured. *Id.*
7. **GUNPOWDER-MAGAZINE — INADEQUATE DEFENSE.** — In an action to recover damages to buildings caused by the explosion of a gunpowder-magazine adjacent thereto, it is no defense that there were other powder-magazines in the same neighborhood at the time; that they were there when the land was bought and the injured buildings erected; that plaintiff's husband had been employed in the powder business; that the property was bought and such buildings erected after the erection of defendant's magazine, in order that plaintiff's husband might be near the magazines; that he had been a stockholder in a powder company, and that plaintiff had leased her land to powder companies for the purpose of storing powder thereon. *Id.*
8. **WHEN MAY BE REMOVED.** — Carrying on an offensive or dangerous trade or business for any number of years in a place remote from buildings and public roads does not entitle the owner to continue it in the same place after houses have been built and roads laid out in the neighborhood, to the occupants of which, and the travelers upon which, it is a nuisance. As the city extends, such nuisances should be removed to the vacant grounds beyond the immediate neighborhood of the residence of the citizens. *Id.*

See LANDLORD AND TENANT, 4; MUNICIPAL CORPORATIONS, 7.

OFFICE AND OFFICERS.

1. **QUESTION WHETHER AN OFFICE IS OR IS NOT VACANT IS AN INTRINSICALLY JUDICIAL ONE.** — *Mandamus* will not lie where an act is judicial, and there is a remedy by appeal. *Board of Commissioners v. Johnson*, 88.
2. **OFFICIAL BONDS, APPEAL FROM DISAPPROVAL OF.** — If an officer presents his bond, and it is rejected on the ground that he is not entitled to the office, there is a judicial decision from which an appeal will lie. *Id.*
3. **STATUTES REQUIRING OFFICIAL BONDS TO BE FILED WITHIN A DESIGNATED TIME** are directory, not mandatory, and the failure to file a bond within such time does not work a forfeiture of the office, nor create a vacancy therein. *Id.*
4. **FORFEITURE FOR FAILURE TO GIVE OFFICIAL BOND.** — One rightfully in office cannot be ousted for failure to give an additional and special bond within the time prescribed by statute, where there is a substantial and close legal question as to when such time began to run, without he is first given a day in court and a hearing. *Id.*
5. **OFFICER, BEFORE HE CAN BE OUSTED BY AUTHORITY, OTHER THAN THAT OF THE APPOINTING POWER,** is entitled to a hearing, because the question whether he shall be ousted is a judicial one, and a decision given without affording him an opportunity to be heard is ineffectual. *Id.*

6. OFFICER NEED NOT SHOW THAT HE IS ELIGIBLE TO AN OFFICE to which he has been duly elected and inducted, where the only question is, whether he has forfeited such office by failure to file an additional bond. *Id.*
7. OFFICER IS PRESUMED TO DO HIS DUTY, in the absence of evidence to the contrary, and when the affidavit of a county treasurer, found among the records of his office, recites the time and places in his county where notice of time for redemption from a tax sale was posted, it will be presumed, in the absence of other evidence, that the officer did his duty, and posted the notice as required by statute. *Washington v. Hosp.*, 141.
- See ASSIGNMENT; COUNTIES, 2; MUNICIPAL CORPORATIONS, 12-14; PROCESS.

OPINION EVIDENCE.

See CRIMINAL LAW, 43-45.

ORDINANCES.

See MUNICIPAL CORPORATIONS.

PARTNERSHIP.

1. MORTGAGE OF REAL ESTATE TO PARTNERSHIP, VALIDITY OF. — A mortgage of real estate given to "Farnham and Lovejoy," of a place designated, is legally sufficient as a mortgage to Sumner W. Farnham and James A. Lovejoy, shown to have been the members of a firm engaged in business at that place under the name of "Farnham and Lovejoy"; and a statutory foreclosure by those persons, under a power of sale contained in the mortgage, is valid, where the only defect suggested is the manner in which the mortgagees are designated in the mortgage. *Mesa v. Burke*, 235.
2. A PARTNER, PART OWNER, OR TENANT IN COMMON CANNOT MAINTAIN AN ACTION AT LAW FOR THE JOINT PROPERTY AGAINST ANOTHER CO-OWNER. — Hence if a partner makes a trust deed of the firm property to secure the payment of his individual debt, and the trustee obtains possession, the other partner has no remedy at law, and must resort to equity for redress. *Hoff v. Rogers*, 301.

See BONDS, 2; DEBTOR AND CREDITOR, 2; DEEDS, 8-11; ASSIGNMENT FOR BENEFIT OF CREDITORS.

PARTY-WALLS.

RIGHT OF ADJOINING OWNER TO USE. — The owner of a town or city lot is not liable to the owner of an adjacent wall, when he merely avails himself of it as part of the inclosure of his premises. If his structure is not in any manner attached to or supported by the wall, and it is not in any manner injured, he is not liable for its use. *Nolen v. Mendere*, 301.

PASSENGERS.

See CARRIERS, 3-12.

PASTURE.

See HIGHWAYS, 7.

PAYMENT.

1. **DEBT, DISCHARGE OF.** — The giving up of a security or an evidence of indebtedness, when accepting another, is a decisive circumstance in determining whether or not the security or evidence of indebtedness so accepted was received in payment or only as additional security. *Fidelity etc. Safe Dep. Co. v. Shenandoah etc. R. R. Co.*, 858.
2. **DEBT WILL BE DEEMED EXTINGUISHED AND PAID** when it consists of coupons and other evidences of debt which are delivered up and canceled, and income bonds received therefor at sixty cents on the dollar, secured on the property of the debtor, and also guaranteed, to a certain extent, by a third and solvent debtor. *Id.*
3. **DEBT IS NOT DISCHARGED BY ANY MERE CHANGE IN ITS FORM** when it is secured by a mortgage, deed of trust, or vendor's lien, unless such was an intention of the parties. On the other hand, if any evidence of debt or security is accepted by the creditor in satisfaction of another debt, the latter is discharged. *Id.*

PEDDLERS.

PEDDLER, WHAT CONSTITUTES. — A person who carries about from house to house small packages of goods manufactured by a foreign corporation, and offers them for sale as the agent of the manufacturers, and who works on a salary, with no personal interest in the goods or their proceeds, is a peddler within the meaning of statute forbidding the sale of foreign or domestic goods, wares, and merchandise by any person as a hawker or peddler. *Commonwealth v. Gardner*, 645.

See STATUTES, 8-10.

PERSONAL INJURIES.

See ASSAULT.

PERSONAL PROPERTY.

1. **COMMINGLED GRAIN IN WAREHOUSE, TITLE TO, IN DEPOSITOR.** — The delivery of grain for storage in a warehouse is a bailment, under the Minnesota statute, and the title thereto remains in the depositor, who is deemed to be the owner of grain in the warehouse to the amount of his deposit, although the identical grain that he deposited may have been removed, and other grain of like kind and quality substituted in its stead. *Hall v. Pillsbury*, 209.
2. **HOLDERS OF GRAIN-RECEIPTS, TENANTS IN COMMON.** — The holders of receipts for grain of the same kind and quality deposited in a warehouse are tenants in common of the mass of grain of that kind and quality in the warehouse, the interest of each being limited to the amount called for by his receipt; and where the warehouseman puts his own grain in the warehouse, he becomes a tenant in common with the other depositors, his interest in the mass being limited to the excess above what is necessary to meet his outstanding receipts. *Id.*
3. **SALE OF GRAIN BY WAREHOUSEMAN, WHEN CONVERSION.** — If a warehouseman sells as his own, grain beyond the amount of the excess above that necessary to meet his outstanding receipts, without express consent of the depositors in his warehouse, his sale passes no title, and the owners may follow the grain into the hands of the purchaser, and recover of him for a conversion. *Id.*

See MORTGAGES, 2-5, 8.

PETITION.

See PLEADING.

PHOTOGRAPHS.

See EVIDENCE, 2.

PLEADING.

Where an original petition is answered by a general denial, and by setting up other matters in defense, and is replied to by a general denial, a second answer not setting forth any new matter need not be replied to. *Dreiling v. First Nat. Bank*, 126.

See DAMAGES; ELECTIONS, 24; LIBEL AND SLANDER, 1, 2.

POISONING.

See CRIMINAL LAW, 17.

POLICE POWER.

See MUNICIPAL CORPORATIONS, 5, 6; NEGLIGENCE, 1, 2.

POSSESSION.

See REAL PROPERTY, 1, 2.

POSSESSION OF STOLEN GOODS.

See CRIMINAL LAW, 18, 19, 21, 41.

PREFERENCES.

See ASSIGNMENT FOR BENEFIT OF CREDITORS; DEBTOR AND CREDITOR, 2; EQUITY, 2-4.

PRESUMPTIONS.

See ALTERATION OF INSTRUMENTS, 2; APPEAL AND ERROR, 5; CORPORATIONS, 13, 16; DEEDS, 3, 9, 11; FRAUDULENT CONVEYANCES, 5; HIGHWAYS, 2; JUDGMENTS, 5; TAXATION, 7; TRUSTS AND TRUSTEES, 9; NEGLIGENCE, 6, 13; OFFICE AND OFFICERS, 7.

PRINCIPAL AND AGENT.

See AGENCY.

PRIORITIES.

See EQUITY, 2, 3; JUDGMENTS, 4.

PROCESS.

1. COURT ACQUIRES JURISDICTION BY FACT OF SERVICE OF SUMMONS BY PUBLICATION, and not from the proof of it filed. *Burr v. Seymour*, 245.
2. AMENDMENT OF AFFIDAVIT OF SERVICE BY PUBLICATION. — Where a judgment by default has been rendered against a defendant served by publication of summons, upon an affidavit which fails to show a sufficient publication, if the summons was in fact duly published, the plaintiff may file, *nunc pro tunc*, a proper and sufficient affidavit of publication, provided it does not appear that it would be unjust to the defendant, or injuriously affect the rights of third parties. *Id.*

3. AMENDMENT OF AN OFFICER'S RETURN OF SERVICE OF PROCESS RELATES back to and becomes a part of the original return, and may therefore impart validity to a judgment which, but for such amendment, would have been treated as void. *Shenandoah etc. R. R. Co. v. Ashby*, 898.
4. AMENDMENT OF A RETURN OF SERVICE OF PROCESS MAY BE MADE AFTER THE OFFICER has gone out of office. *Id.*
5. AMENDMENT OF RETURN OF SERVICE OF PROCESS WILL BE ALLOWED to be made so as to show that the court had jurisdiction when it entered the judgment, though before the amendment is made other judgments have been recovered against the defendant, which, but for the amendment, would be paramount liens against his property. *Id.*

See JUDGMENTS, 5, 24.

PROMISSORY NOTES.

See NEGOTIABLE INSTRUMENTS.

PROOFS OF LOSS.

See INSURANCE, 14, 21-23.

PROVOCATION.

See ASSAULT, 2; CRIMINAL LAW, 26-28.

PUBLIC HOUSE.

See CRIMINAL LAW, 31, 32.

PUBLIC POLICY.

See NEGLIGENCE, 2.

PUBLICATION.

See PROCESS.

PUNISHMENT.

See CONTEMPT; STATUTES, 11.

QUALIFICATIONS OF ELECTORS.

See ELECTIONS.

RAILROAD COMPANIES.

1. RIGHT TO ADOPT IMPROVED RAILS. — A street-railroad company whose charter is silent as to the kind of rail to be used is not confined to the use of the kind of rail generally adopted when the charter was granted, but may adopt another and improved rail when by so doing it does not impose an additional burden upon the street nor upon the city. *Easton etc. Ry Co. v. City of Easton*, 658.
2. STOCKHOLDER'S LIABILITY FOR NEGLIGENCE. — Stockholders in a railroad company are not individually liable for the negligence of the officers, agents, or employees of the company operating the road. The remedy is against the company, not against the stockholders. *Atchison etc. R. R. Co. v. Cochran*, 129.
3. CORPORATIONS, RIGHT OF ONE TO PURCHASE STOCK OF ANOTHER. — A railroad company may purchase and hold the stock of any other railroad

- company whose line of road, constructed or being constructed, connects with its own. This right exists under statute in Kansas. *Id.*
4. **STOCKHOLDER'S LIABILITY FOR NEGLIGENCE OF CONNECTING ROAD.** — Where the rights and powers of a railroad company in relation to a connecting road are those of a stockholder merely, the former, as such stockholder, is not liable for the negligence of the latter. *Id.*
 5. **RATE OF SPEED OF TRAINS.** — Where a railroad company has complied with the law in regard to fencing its road and constructing crossings, and has provided its engines and cars with proper appliances, it is entitled to the use of the road for the passage of trains at all times, to increase the speed of its regular trains when behind time, and to run special or wild trains at all times. In such cases, a rate of speed of sixty miles an hour is not negligence when the train is running outside of villages or cities, or through a sparsely settled community, and when the law does not limit the rate of speed. *Robinson v. Flint etc. R. R. Co.*, 174.
 6. **RATE OF SPEED—LIABILITY FOR INJURY TO ANIMALS.** — Railroad companies are not required to slacken the speed of their trains at the numerous highway crossings in the country, which they are passing every few minutes, nor are they obliged to slacken their speed when cattle are in the highway near the track. It is only when the engineer, in the exercise of due caution, sees danger that he is required to slacken speed. He must then take all proper steps to avoid danger. Still, in such case, his first duty, is for the safety of his passengers, and when he cannot stop his train before striking the animals, he is justified in running at a high rate of speed, if in so doing there is less danger of derailing his train, though the result is to render the escape of the animals more difficult. *Id.*
 7. **NEGLECT—CATTLE RUNNING AT LARGE.** — An owner, by turning his cattle at large in a public highway without a keeper, is guilty of contributory negligence, and cannot recover for injury thereto from collision with a train, when the railroad company has complied with the law in regard to fences and crossings, although the train was running at a high rate of speed at the time of the accident. *Id.*
 8. **INJURIES TO CATTLE RUNNING AT LARGE.** — The owner of cattle running at large without a keeper has no recourse against a railroad company for the loss of his property from collision, in the absence of allegation and proof of reckless, wanton, and willful conduct on the part of the company. On the other hand, such owner is liable in such case for damages resulting to the company or its passengers. *Id.*
 9. **CONTRIBUTORY NEGLIGENCE—CATTLE RUNNING AT LARGE.** — A person who permits his animals to run at large, where it is highly probable, if not inevitable, that they will run into dangerous places, will be judged by the same rule as when he places himself in the presence of danger, and thereby suffers injury which his own prudence might have avoided. In either case he cannot recover for the injury. *Id.*
 10. **NEGLECT—A RAILWAY COMPANY SHOULD NOT BE ADJUDGED GUILTY OF NEGLIGENCE BECAUSE** its engineer and fireman in charge of a locomotive did not keep a lookout, and on that account failed to see an animal on the track, if they were prevented from keeping such lookout by giving their attention to other duties which it was at the time incumbent on them to perform. *Howard v. Louisville etc. Ry Co.*, 302.
 11. **NEGLECT IN LEAVING TURN-TABLE OPEN.** — Where a railway company leaves its turn-table unfastened, or so slightly fastened that children not

sui juris can unfasten and use it, the company is liable for an injury resulting from its use by them. On account of want of intelligence on the part of the children, the negligence of the company is deemed the proximate cause of the injury. *Gulf etc. R'y Co. v. McWhirter*, 755.

12. **CONCURRENT NEGLIGENCE — LEAVING TURN-TABLE OPEN.** — When a turn-table or other dangerous machinery, such as is likely to attract children to it for purposes of amusement, is left unfastened, this is negligence on the part of the owner; and if, while in such condition, it is put in motion by one of sufficient intelligence to make his act negligence, then both he and the owner are liable for their concurrent negligence, through which a child not *sui juris*, and hence not guilty of contributory negligence, is injured. *Id.*
13. **NEGLECT — RAILROAD'S LIABILITY TO INFANT TRESPASSER.** — A boy ten years of age who, just before being injured by a moving train, was lying on his back underneath the cars, and crosswise of the track, and who was not in the employ of the company, nor attempting to cross the track, is a trespasser, and cannot recover for his injury. *McMullen v. Pennsylvania R. R. Co.*, 591.
14. **NEGLECT — RAILROAD'S LIABILITY TO INFANT TRESPASSER.** — A boy ten years of age who is an undoubted trespasser upon a railroad track, where he is injured by a moving train, cannot recover for his injury, notwithstanding his youth, which renders him unaccountable for his own negligence. *Id.*
15. **CROSSING.** — A person, before crossing a railroad track, must stop, look, and listen, and this rule applies to pedestrians as well as others. *Cincinnati etc. R'y Co. v. Howard*, 96.
16. **NEGLECT — IF THE CROSSING OF A RAILROAD IS SO OBSTRUCTED THAT AN APPROACHING TRAIN CANNOT BE SEEN NOR HEARD** until the traveler comes very near the railroad track, common prudence requires him to approach at such speed that when an approaching train may be seen, he may be able to stop and allow it to pass. *Id.*
17. **CROSSING.** — IF THERE IS ANY OBSTRUCTION TO SIGHT OR HEARING in the direction of an approaching train, such obstruction requires increased care on the part of one approaching the crossing. In such cases the care must be in proportion to the increased danger that may come from the use of the highway at such a place. *Id.*
18. **CONTRIBUTORY NEGLIGENCE — BURDEN OF PROOF.** — When a person crossing a railway track is injured by collision with the train, the fault is *prima facie* his own, and he must show affirmatively that his fault or negligence did not contribute to the injury, before he is entitled to recover therefor. *Id.*
19. **CONTRIBUTORY NEGLIGENCE.** — TRAVELER UPON A PUBLIC HIGHWAY CROSSING A RAILROAD is guilty of contributory negligence if he drives upon the crossing without stopping to look or listen, though he does not hear any whistle sounded nor bell rung, and though the view is obstructed, and there are no indications of danger. *Id.*
20. **RAILROADS — CONTRIBUTORY NEGLIGENCE.** — The fact that a train was behind time, and was running faster than its usual speed at a crossing, to make up time, does not exonerate one about to cross the track from exercising the care and caution required when a train is on time and running at its usual rate of speed. *Id.*

See CARRIERS; MASTER AND SERVANT; MUNICIPAL CORPORATIONS, 7.
SALMA, 1.

RAPE

See CRIMINAL LAW, 32-33.

RATIFICATION.

See CORPORATIONS, 8; INSURANCE, 6.

REAL PROPERTY.

1. **MYSTIC POSSESSION OF TENANT IN COMMON IS NOTICE OF HIS OWN TITLE ONLY**, but is not notice of change of title on the part of his co-tenant. He is presumed to be in his own right, by virtue of his own title, and not under his co-tenant's title. *Wilcox v. Leominster Nat. Bank*, 259.
2. **POSSESSION BY TENANT NOTICE TO JUDGMENT CREDITOR OF WHAT.** — Where a judgment creditor asserts a lien upon real estate actually occupied by a third party as a tenant of the judgment debtor, at the time of the docketing of the judgment, he is charged with constructive notice of all the occupant's rights and interests, and he is also affected with like notice of title in the occupant's landlord. *Wilkins v. Bosier*, 233.

See DEDICATION, 1, 2; HIGHWAYS; FIXTURES.

REGISTRATION.

See ELECTIONS.

RES GESTÆ

See CRIMINAL LAW, 7, 46; EVIDENCE, 6, 7; JUDGMENTS.

RESALE

See SALES, 2-4.

REVIEW.

See APPEAL AND ERROR.

REVOCATION OF CHARTER.

See CORPORATIONS.

RIPARIAN RIGHTS.

See WATERCOURSES.

ROBBERY.

See CRIMINAL LAW, 13, 14, 37-46.

SALES.

1. **RAILROAD CORPORATIONS, AND MORTGAGE LIENS THEREON.** — When there is a mortgage on a railway, and the corporation makes a conditional purchase of locomotives and cars, and the vendor reserves the title as security for the payment of the purchase price, he has a right, if the railway goes into the hands of a receiver, to the possession of such engines and cars, and compensation for their use, but the balance of the purchase price due him is not such a debt as in equity and good conscience ought to be accorded priority over the mortgage creditors. *Fidelity etc. Safe Dep. Co. v. Shenandoah etc. R. R. Co.*, 853.

2. **RIGHT OF SELLER TO RESELL** in satisfaction of unpaid purchase-money, if title, but not possession, has passed, is well settled; and if there is a contract to sell, and performance is tendered by the seller, the same rule applies. *Waples v. Overaker*, 727.
3. **RIGHT OF SELLER TO RESELL—NOTICE TO BUYER** — It is enough to authorize a resale that the defaulting buyer has notice of the facts which give the wronged seller the right to resell, when these consist of the absolute refusal of the buyer to comply with the contract of sale; and the place of resale is not then restricted to the place where, by the contract, the buyer was bound to receive the property; but the seller may ship to a distant market and sell, if in doing so he exercises good faith and due diligence, with intent to realize the best price he can on resale. *Id.*
4. **RIGHT OF SELLER TO RESELL** — When the right of the seller to resell arises from the absolute refusal of the buyer to receive the goods in compliance with the contract of sale, if the buyer desires to select the market for resale, he must receive the goods and send them to that market. *Id.*
5. **DECLARATION OF MATERIAL FACT**. — A false representation as to his financial status, made by a person to a commercial agency, with a view to obtaining credit, is a declaration of a material fact, and not the mere expression of an opinion. *Gainesville Nat. Bank v. Bamberger*, 738.
6. **CANCELLATION OF SALE FOR FALSE REPRESENTATIONS**. — Misrepresentations made by one person, not with a view of reaching another, are not available to one who may have acted upon them, to cancel a sale made by reason thereof, but a third person, to whom they were not directly made, can cancel a sale made by him, when the representations were made with direct intent that he should act upon them in the manner which occasioned the injury. *Id.*
7. **CANCELLATION OF SALE FOR FALSE REPRESENTATIONS**. — It is not essential to the cancellation of a sale that false representations should be addressed to the party directly who seeks a remedy for having been deceived and defrauded by means thereof. If they were false, and so known to be by the party making them, and were made with intent that they should be communicated to and believed by others interested in ascertaining the pecuniary responsibility of the buyer, and with intent to procure credit and defraud sellers, and were relied upon by the seller, and the sale procured thereby, he is entitled to rescind. *Id.*
8. **CANCELLATION OF SALE FOR FALSE REPRESENTATIONS TO COMMERCIAL AGENCY**. — Where a person, for the purpose of obtaining credit, makes false statements to a commercial agency as to his financial status, expecting them to be acted upon, and effects a purchase by such means, the seller may, upon discovering the fraud, cancel the sale and reclaim his goods, even as against other attachment creditors of the buyer. *Id.*
9. **WARRANTY, BREACH OF**. — If a party contracts to furnish certain apparatus guaranteed to be of certain quality and capability, the guaranty amounts to a warranty, and its non-fulfillment to a breach of warranty; and where, in such case, the apparatus is to be completed by a certain time, named and accepted, if the guaranty was fulfilled by another time named, it must be regarded that the period between the two times was to be used to test the apparatus to ascertain if it fulfilled the guaranty; and if it failed, the defects which would thus be shown to exist must be regarded as patent defects as contradistinguished from latent defects. *Underwood v. Wolf*, 40.

10. **WARRANTY—RIGHT TO KEEP PROPERTY AND SUE FOR BREACH.**—Where there is a sale and delivery of personal property *in present*, with express warranty, and the property turns out to be defective, the vendee may receive the property and use it, and then sue for a breach of the warranty, or when sued for the purchase price, may recoup such damages under the general issue, or set them up in a special plea of set-off. *Id.*
11. **WARRANTY IN EXECUTORY CONTRACT—RIGHT TO RETAIN PROPERTY AND SUE FOR BREACH.**—Where a contract is executory, with a warranty and time fixed for testing its fulfillment, the acceptance and use of the property after such time has passed is not a waiver of the right to claim damages for a breach of warranty, under the rule as established in Illinois. *Id.*
12. **WARRANTY IN EXECUTORY CONTRACTS, AND PROOF OF BREACH OF, IN REDUCTION OF DAMAGES.**—Where a contract of sale is executory, with a warranty, the purchaser may, in all cases, in an action for its price or value, prove the breach of warranty in reduction of damages, and the sum to be recovered for the price of the article will be reduced by so much as it is diminished in value by non-compliance with the warranty. *Id.*
13. **BREACH OF WARRANTY IN EXECUTORY CONTRACT—BURDEN OF PROOF.**—Where the vendee in an executory contract relies upon a breach of warranty as a defense or by way of set-off in an action for the purchase price, the burden of proof is on him to show the breach and the actual damages resulting, and such damages do not include probable profits or prospective gains. *Id.*
14. **BREACH OF WARRANTY IN EXECUTORY CONTRACT—RIGHT TO RESCIND OR SET OFF DAMAGES IN ACTION FOR PRICE.**—Where a contract for sale is executory, with a warranty, and the time for examination, whether fixed by the contract or allowed by law, has passed, the buyer may refuse to accept the goods and return them, or he may accept them and sue for a breach of the warranty, or rely upon the damages for such breach in reduction in an action for the contract price. But if he rescinds and returns the goods, he must offer them back as soon as he discovers the breach, or after he has had a reasonable time for their examination. The right to rescind is waived by retaining and continuing the use of the goods longer than is necessary for a trial of them. *Id.*
15. **BREACH OF WARRANTY—RIGHT TO RECOUP DAMAGES IN ACTION FOR PRICE.**—When personal property is sold under an executory contract with warranty, the purchaser may recoup damages for a breach of the warranty in an action for the price, although he retained the property after knowledge of the defect. *Id.*
16. **BREACH OF WARRANTY IN EXECUTORY CONTRACT—ACCEPTANCE—RIGHT TO RECOVER DAMAGES.**—Where goods are sold under an executory contract with warranty, there may be an acceptance of them in full discharge of the contract; or there may be an acceptance in such sense that the buyer retains and uses them and becomes invested with the title and ownership, but reserves the right to claim damages for a breach of the warranty, or to recoup them in an action for the price. *Id.*
17. **BREACH OF WARRANTY IN EXECUTORY CONTRACT—RIGHTS OF PURCHASER.**—When the time for examining an article sold under an executory contract with warranty is extended by agreement of the parties, whatever the purchaser was required to do during the original time in the way of rejecting or accepting the article he may do during the time

as extended, without affecting his right to accept the article in full discharge of the contract, or with the reserved right to claim damages for the breach of the warranty, or to recoup them in an action for the price. *Id.*

See CONTRACTS, 2; SPECIFIC PERFORMANCE, 1, 2; TRUSTS AND TRUSTEES, 7-12.

SAVINGS BANKS.

See BANKS AND BANKING, 4, 5.

SEAL.

See DEEDS, 7.

SELF-DEFENSE.

See CRIMINAL LAW, 26, 27.

SHERIFF'S RETURN.

See EXECUTION, 2; PROCESS.

SIGNATURES.

See EVIDENCE, 1-4.

SLANDER.

See LIBEL AND SLANDER.

SPECIFIC PERFORMANCE.

1. SPECIFIC PERFORMANCE. — A contract for the sale or mortgaging of subsequently acquired chattels will not be specifically enforced, where no chattels are specifically described, the only description being that contained in the general word "property." The equitable title to goods as well as to land is confined to specific property, and does not extend to goods which are undetermined. *Borden v. Orosk*, 23.
2. SPECIFIC PERFORMANCE OF CONTRACT FOR SALE OF CHATTELS by the vendor will be decreed in equity, where the payment agreed upon by the parties was to be made by specific securities, and the remedy at law is inadequate. *Rothholz v. Schwartz*, 409.
3. WAIVER OF DEFENSE. — Where, in a suit for specific performance, the defendant intends to ask the court not to exercise jurisdiction, because the remedy at law is adequate, the objection should be taken by answer, and unless so taken, will ordinarily be deemed to have been waived. *Id.*

STATION-GROUNDS.

See CARRIERS, 5.

STATUTES.

1. THE REQUIREMENT OF THE CONSTITUTION THAT NO LAW SHALL EMBRACE MORE THAN ONE OBJECT, which shall be expressed in its title, is mandatory, and a statute which disregards it must be declared void. *Fidelity etc. Safe Dep. Co. v. Shenandoah Valley R. R. Co.*, 858.
 2. OBJECT NOT EXPRESSED IN TITLE OF STATUTE. — THE TITLE TO AN ACT MAY BE SO RESTRICTIVE as to exclude matters which might have been.
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- embraced in one enactment with the matters indicated in the title. In such case, the matter excluded by the restrictive words of the title cannot be inserted in the body of the statute without making it void. *Id.*
3. IF THE OBJECT OF A STATUTE AS EXPRESSED IN ITS TITLE is to secure the wages of certain employees of railway and other corporations, and it contains a provision securing liens to persons furnishing iron, fuel, and other supplies, such provision is not within the object of the act as stated in the title, and is therefore inoperative. *Id.*
 4. UNCONSTITUTIONAL STATUTE IS ABSOLUTELY NULL AND VOID. It is a misnomer to call it a law; it is to be regarded as never having been possessed of any legal force or effect; and the subsequent adoption of an amendment to the constitution authorizing the enactment of such a statute cannot give it validity. *State v. Tuffy*, 374.
 5. RETROSPECTIVE LAW. — Amendment to the constitution of a state, authorizing its legislature to enact a particular law, cannot impart validity to a law of the same character previously enacted, but which, when so enacted, was unconstitutional and void. *Id.*
 6. STATUTES, EVIDENCE TO VARY OR CONTRADICT. — A statute legally authenticated cannot be annulled, varied, or contradicted by the legislative journals, or in any other mode. *Standard U. Cable Co. v. Attorney-General*, 394.
 7. CONSTRUCTION OF. — EVERY STATUTE SHOULD RECEIVE A REASONABLE CONSTRUCTION, and such, if possible, as to avoid repugnancy to the constitution. Hence an act authorizing a telegraph company to construct lines and fixtures along a county road, provided the ordinary use of the road is not obstructed, and not expressly declaring that this may be done without compensation, will not be considered as an attempt to deprive owners of such compensation as is guaranteed to them by the constitution of the state. *Western Union Tel. Co. v. Williams*, 908.
 8. A STATUTE FORBIDDING THE SALE of foreign or domestic goods, wares, and merchandise by any person as a hawk or peddler relates to the manner of sale, and not the right to sell, is a valid exercise of police power, and is not a violation of the right secured by the constitution of acquiring, possessing, and protecting property. *Commonwealth v. Gardner*, 645.
 9. CONSTRUCTION. — A statute forbidding the sale by any person, of goods, wares, and merchandise as a hawk or peddler does not include nor affect the farmer or gardener who raises the natural products of the soil and sells them from house to house. It is only meant to include traders and travelers who, without any fixed place of business, carry their goods on their back, or in a cart or wagon, in search of customers. *Id.*
 10. INTERSTATE COMMERCE. — A statute forbidding the sale of goods, wares, and merchandise by any person as a hawk or peddler, within a certain territory within a state, is a valid exercise of the police power, and not unconstitutional as a regulation of interstate commerce. *Id.*
 11. DIFFERENT PUNISHMENTS PRESCRIBED BY THE SAME STATUTE for different acts constituting the same offense in a different degree, or by different classes of persons, is not objective legislation, nor is such act void for uncertainty in that it prescribes different punishments for the same offense. *Ex parte Garza*, 845.

See COMMON LAW; CONTEMPT, 3; ELECTIONS, 2, 3.

STATUTE OF FRAUDS.

See VENDOR AND VENDEE, 1-2.

STOCKHOLDERS.

See RAILROAD COMPANIES.

STORE-KEEPERS AND CUSTOMERS.

See NEGLIGENCE, 7.

STREET-RAILROADS.

See RAILROAD COMPANIES.

STREETS.

See DEDICATION, 1, 2.

SUBROGATION.

SUBROGATION IS AN EQUITABLE REMEDY, allowed only when it does not conflict with the legal or equitable rights of other creditors of the common debtor. If moneys are loaned to a railway corporation in the ordinary course of business, and without any agreement as to the use to be made of them, and they are afterwards paid out to laborers and supply-men, after which the corporation goes into the hands of a receiver, the persons making such loans are not entitled to be subrogated to the claims paid with the moneys loaned, as against mortgagees of the corporation. *Fidelity etc. Safe Dep. Co. v. Shenandoah etc. R. R. Co.*, 858.

SUICIDE.

See INSURANCE, 23.

SUMMONS.

See PROCESS.

SUNDAY.

See CARRIERS, 4; CRIMINAL LAW, 22.

SURETYSHIP.

See BONDS.

TAXATION.

1. **JURISDICTION TO TEST VALIDITY OF STATUTE**. — Where a statute employs an injunction merely as a means of enforcing payment of a tax levied under it, the refusal to pay such tax presents a proper case for an injunction; but the validity of the tax presents a legal question of which the courts of law have exclusive jurisdiction. *Standard U. Cable Co. v. Attorney-General*, 394.
2. **THE POWER OF THE LEGISLATURE TO IMPOSE TAXES** on persons, property, business, and franchises is unlimited, save only by such restrictions upon the exercise of that power as are found in the organic law, or such as are inherent in the nature of the subject. *Id.*
3. **A LICENSE TAX IMPOSED ON CORPORATIONS** for exercising their franchises is not a property tax, and cannot conflict with constitutional provisions requiring equality in the taxation of property. *Id.*

4. **CORPORATE PROPERTY.** — The holding of a charter from one state, when the corporate property is located or corporate business transacted in another state, does not relieve the corporation in both or either state from taxation, in any form which the legislative power may, under its constitution, adopt. *Id.*
5. **TAX SALES—WHO MAY ACQUIRE VALID TAX TITLE.** — If husband and wife are out of possession, he may, after the death of a testator, acquire a valid tax title to the land of the heirs of which his wife is one, and title so acquired is superior to the rights of a mortgagee of the testator. *Broquet v. Warner*, 124.
6. **SUFFICIENCY OF REDEMPTION NOTICE.** — Under a statute requiring that notices of the time limited to redeem land from tax sale by publication and posting must be completed four months before the expiration of the time allowed for redemption, the posting of notice, as required, four months before such time, together with proper publication, is a compliance with the statute, although the notice by publication and the notice by posting have not existed for the same length of time. *Washington v. Hoag*, 141.
7. **PRESUMPTION OF VALIDITY.** — A tax deed regular upon its face is *prima facie* evidence of the regularity of the proceedings, and that the redemption lists and notices were properly posted as required by statute. The burden of proof is on the party attacking the deed to show its invalidity. *Id.*

See CORPORATIONS, 4; INTERSTATE COMMERCE.

TAX SALES.

See TAXATION, 5-7.

TELEGRAPH COMPANIES.

1. **TELEGRAPH COMPANIES—DUTY TO DELIVER MESSAGE.** — When a telegraphic message is received and sent directed to one person in care of another, the liability of the company ends with the delivery of the message to the person in whose care it is directed. *Western Union Tel. Co. v. Young*, 751.
2. **LIABILITY FOR MISTAKE IN TRANSMISSION OF MESSAGE.** — If a message as written, read in the light of a well-known usage in commercial correspondence, reasonably informs the operator that the message is one of business importance, and discloses the transaction so far as is necessary to accomplish the purpose for which it is sent, the company is liable for all direct damages resulting from a negligent failure to transmit it as written within a reasonable time, unless such negligence is in some way excused. The message need not on its face disclose the nature of the business so that the operator may understand its meaning as to the article, quantity, quality, or price. *Postal Tel. Cable Co. v. Lathrop*, 55.

See CONTRACTS, 3; HIGHWAYS, 6; STATUTES, 7

TENDER.

COSTS. — Where tender is not made until after suit, defendant is liable for costs accruing prior to the tender. *Berry v. Davis*, 748.

See CHATTEL MORTGAGES, 1.

THREATS.

See CRIMINAL LAW, 24-26.

TORTS.

See *ARSAULT*.

TRADE-MARKS.

1. WHAT CONSTITUTES A TRADE-MARK IS A QUESTION OF LAW for the court. Whether a trade-mark has been so constituted, and if so constituted whether there has been an infringement of it, are ordinarily questions of fact for the jury. *Alf v. Radam*, 792.
2. WHAT CONSTITUTES, AND RIGHT OF OWNER. — The owner of an original trade-mark will be protected in the exclusive use of all marks, forms, or symbols appropriated as designating the true origin or ownership of the article to which they are affixed. But he has no right to the exclusive use of any words, letters, figures, or symbols which have no relation to the origin or ownership of the goods, and are only meant to indicate their names or quality. He has no right to appropriate a sign or symbol which, from the nature of the fact it is used to signify, others may employ with equal truth, and therefore have an equal right to employ for the same purpose. *Id.*
3. WORDS IN COMMON USE are common property, and no exclusive right to the use of such words can be acquired by adopting them as a trade-mark, unless they are used in an arbitrary or fanciful sense, and not in their ordinary signification. *Id.*
4. WORDS "MICROBE KILLER," used in their ordinary and not in any arbitrary or fanciful sense, cannot constitute a trade-mark. *Id.*
5. FRAUD — IMITATION OF LABEL. — Although a peculiar device on labels adopted by one may not constitute a trade-mark, still if it is imitated by another in a way calculated to deceive and does deceive ordinarily prudent persons, they, and the one whose label is imitated, are entitled to protection; but when the labels are so entirely dissimilar as not to deceive such persons, no action will lie for fraudulent imitation. *Id.*

TRESPASSERS.

See *CARRIERS*, 6-9; *FORCEFUL ENTRY AND UNLAWFUL DETAINER; MASTER AND SERVANT*, 1; *RAILROAD COMPANIES*, 13, 14.

TRIAL.

1. INSTRUCTIONS RATHER IN THE NATURE OF A RÉSUMÉ OF THE EVIDENCE and an argument, than concise statements of law, should be refused. *Postal Tel. Cable Co. v. Lathrop*, 55.
2. INSTRUCTIONS INVOLVING ABSTRACT PROPOSITIONS are properly refused, especially when the charges given fairly present the case to the jury. *International etc. Ry Co. v. Prince*, 795.
3. FORM AND NUMBER OF ISSUES submitted must be determined by the trial judge, in the exercise of a sound discretion, provided they are always such as will justify the entry of judgment, and provide the appellant an opportunity to present to the court below, or on appeal, any view of the law applicable to the evidence. *Boyer v. Teague*, 547.
4. CROSS-EXAMINATION. — The extent to which cross-examinations shall be conducted is largely in the discretion of the trial court, and such discretion will not be interfered with unless it clearly appears that it was abused to the injury of the party complaining. *White Sewing-Machine Co. v. Gordon*, 109.

5. **JURY, READING DEPOSITION TO, AFTER RETIREMENT.** — After the jury has retired, and has disagreed about a deposition which was introduced in evidence during the trial, it is not error to allow it to be reread to the jury at its request. *Clark v. State*, 817.
6. **JURY, DISCRETION OF JUDGE IN DISCHARGING.** — It is within the discretion of the court as to whether or not it will discharge the jury because it has been kept together such a time as to render it improbable that it will agree, and such discretion will not be reviewed unless it has been abused. *Id.*
7. **JURY AND JURORS—SUMMONING NEW PANEL AFTER CHALLENGE TO ARRAY.** — Under a statute authorizing the appointment by the judge of some suitable person to summon jurors from the by-standers in certain cases, where the sheriff is a party to or interested in the suit, the court may appoint such party to summon a new panel from the by-standers, when a challenge to the array has been sustained for sufficient cause, and this though the action was commenced before the enactment of the statute. *Boyer v. Teague*, 547.
8. **JURY—CHALLENGE TO THE ARRAY.** — Where a sheriff, who is the contestee in an action involving the title to his office, knows that the case is set for hearing at a special term, and in selecting the jurors for that term himself takes the names from a box who draws them from a box, the former reading them to the county commissioners without their seeing the names, and then passing them into a locked box, this is such an irregularity as furnishes sufficient ground for a challenge to the array under the code of North Carolina, sections 1722-1730, prescribing the qualifications and mode of selecting and drawing jurors for special terms by county commissioners, and providing that the sheriff need not act in such case, except when such commissioners neglect to act. *Id.*
See **APPEAL AND ERROR; CRIMINAL LAW, 4-6, 24; DEPOSITIONS.**

TRIAL BY JURY.

See **CONTEMPT, 1, 2.**

TRUSTS AND TRUSTEES.

1. **TRUSTEE NOT LIABLE FOR LOSSES OCCASIONED BY BAD FAITH OR CRIME OF HIS CO-TRUSTEE.** — A trustee does not, by virtue of his acceptance of a trust, become an insurer of the trust funds against the possibility of loss, nor a surety for his co-trustee. His undertaking is personal, requiring of him good faith and reasonable diligence, and if these requirements are met, he is not liable for losses occasioned by the bad faith or the crimes of his co-trustee. *Estate of Femire*, 676.
2. **TRUSTEE LIABLE FOR EMBEZZLEMENT OF TRUST FUND BY HIS CO-TRUSTEE WHEN.** — Where two of three trustees of a fund directed to be invested in good real estate security put it into the power of a third trustee to collect the principal of a mortgage belonging to the trust, it is their duty to see that such principal is properly reinvested. And if they neglect this duty, and the money is, through their neglect, lost by the embezzlement thereof by their co-trustee, they will be liable for the loss. *Id.*
3. **TRUSTEE NOT LIABLE FOR FRAUD OF HIS CO-TRUSTEE WHEN.** — Where two of three trustees leave with the third trustee securities belonging to the trust, which he embezzles, if they have not done or omitted to do anything which has contributed to render the fraud possible, they will not be responsible for its consequences. *Id.*

4. CO-TRUSTEES LIABLE FOR EMBEZZLEMENT OF TRUSTEE MAY APPLY PROCEEDS OF SECURITIES GIVEN THEM BY HIM AS HE DIRECTS. — Where a trustee who has embezzled trust funds, for a part of which his co-trustees are liable on the ground of their negligence, puts in the hands of his co-trustees such securities as he has, confesses judgment in their favor for the amounts embezzled, and directs that the moneys to be collected from such securities shall be appropriated to the payment of the amount for which the co-trustees are liable, they have the right to apply it as he has directed. *Id.*
5. LIEN AGAINST TRUST ESTATE. — A claim for compensation by a person employed by a trustee to negotiate a loan for a trust estate without an order of court, but under promise from the trustee that the claim should be paid out of the trust fund, cannot be enforced against the trust estate, in the absence of insolvency on the part of the trustee or an agreement by him exempting himself from personal liability, making the claim a specific lien against the trust fund. The only remedy is against the trustee personally, or against his estate in case of his death. *Johnson v. Leman*, 63.
6. LIEN FOR EMPLOYMENT AGAINST TRUST ESTATE. — As a general rule, the expenses of properly administering a trust are a lien on behalf of the trustee on the estate in his hands, and he will not be compelled to part with his control of that estate until such expenses are paid. This lien, however, unless in exceptional cases, does not extend to persons employed by the trustee. Their only remedy for compensation is personal against the trustee employing them. *Id.*
7. TRUSTEE'S SALE CONDUCTED BY HIS AGENT — FAILURE OF TRUSTEE TO TAKE POSSESSION. — Trustee's sale is not rendered invalid by the fact that the sale was cried by a person selected by the trustee, whose act the trustee afterwards confirmed, nor by the latter's failure to take possession of the land before the sale, though the trust deed declared that upon default the trustee should immediately take possession, and after giving notice, sell the land therein described. *Tyler v. Herring*, 263.
8. TRUSTEE'S SALE. — THE PERFORMANCE OF THE MERE MINISTERIAL ACTS of posting the notice and making sale by agents selected by the trustee does not affect the validity of the sale. *Id.*
9. TRUSTEE'S SALE, PRESUMPTION IN SUPPORT OF. — The presumption is to be indulged that a trustee did those acts *in pais* which were conditions precedent to the valid execution of the power of sale. The force of this presumption may be overcome by any competent evidence sufficient to produce an equilibrium, or to leave the preponderance so lightly in favor of the presumption as that the jury do not believe some act to have been done which was essential to the validity of the sale. *Id.*
10. EVIDENCE. — TRUSTEE'S DEED WHICH RECITES that the sale had been made after giving notice as required by the deed of trust establishes *prima facie* that proper notice has been given; but the effect of the deed in this respect may be overcome by any competent evidence which, notwithstanding the deed and its recitals, leaves the jury unable to say that the notice was given. *Id.*
11. SALE BY TRUSTEE TO HIS WIFE. — Where a trustee sells the trust estate to one who by previous agreement purchases for the wife of the trustee, the sale will be set aside on the application of a *cestui que trust*, nor is evidence that the sale was fair and for the best price obtainable admissible. *Bassett v. Shoemaker*, 435.

12. **PURCHASER, BY TRUSTEE'S WIFE AT HIS SALE** — Where a husband sells as trustee, his wife is excluded from purchasing at the sale directly from him. If she desires to become a purchaser, she must apply to the court and obtain an order that the sale be conducted by and under the supervision of a master, who, in case she purchases, will convey in due form to her. *Id.*

See CHATTEL MORTGAGES, 2; CORPORATIONS, 5; DEEDS, 2, 3.

ULTRA VIRES.

See BANKS AND BANKING, 5; CORPORATIONS, 6-11.

UNEARNED PAY.

See ASSIGNMENT.

UNRECORDED DEED.

See DEEDS, 13; JUDGMENTS, 4.

USAGE.

USAGE, EFFECT OF, AS EVIDENCE. — A usage, if known to the parties to a transaction to which it relates, is obligatory, and unless excluded by the terms of the contract, enters into and is regarded as part of it, as much as though it had been written therein. It is admissible to add incidents to the contract not inconsistent with its terms, and to ascertain the intention of the parties in reference to matters about which the contract is silent, unless it is unreasonable or in conflict with positive law. *First Nat. Bank v. Fish*, 635.

VACANT AND UNOCCUPIED.

See INSURANCE, 3, 4.

VENDOR AND VENDER.

1. **STATUTE OF FRAUDS.** — A MEMORANDUM IS NOT SUFFICIENT TO TAKE A SALE OUT OF THE STATUTE OF FRAUDS, UNLESS it contains substantially the whole agreement and all its material terms and conditions, so that one reading it can understand from it what the agreement is. It must be such that when produced in evidence it will inform the court or jury, without parol evidence, of the essential facts set forth in the pleading, and which go to make a valid contract. These essential facts consist of the subject-matter of the sale, the terms, and the names or descriptions of the parties. *Mears v. Newmiller*, 514.
2. **STATUTE OF FRAUDS.** — MEMORANDUM OF A SALE OF REAL ESTATE WHICH does not name nor describe the vendor is fatally defective. *Id.*
3. **STATUTE OF FRAUDS SHOULD NOT BE MADE AN INSTRUMENT OF FRAUD.** — WHERE A WOMAN ABOUT TO BE MARRIED IS INDUCED TO CONVEY her property to the wife of a brother of her intended husband, by the agreement of the grantee and the representations of the intended husband that as soon as the marriage took place she would reconvey the property to the grantor, and where the relations of the parties to the deed were, before it was made, of a very intimate and fiduciary character, the agreement to reconvey will not be regarded as within the statute of frauds, and will be specifically enforced. Where it would operate as

fraud to allow a grantee to rely upon his deed absolute on its face, parol evidence will be admitted to prove the facts establishing a trust. *Catalani v. Catalani*, 73.

4. **VENDOR'S LIEN DOES NOT ARISE ON SALE OF BOTH REAL AND PERSONAL PROPERTY WHEN.** — A vendor's lien does not arise from the sale of both real and personal property for one entire sum or consideration, where no distinct price is set upon the real property. Nor is the vendor of real property entitled to an implied equitable lien to secure the performance of the consideration when that is of such a nature that the court cannot accurately ascertain and define the amount of the charge to be imposed upon the land and enforced out of it, as where the consideration is an agreement to support the grantor during life. *Peters v. Tuncell*, 252.

VICE-PRINCIPAL

See MASTER AND SERVANT, 11, 12, 22, 25.

VOTERS.

See ELECTIONS.

WAIVER.

See SPECIFIC PERFORMANCE, 2.

WAIVERS OF CONDITIONS.

See INSURANCE, 11-20.

WAREHOUSEMEN.

See PERSONAL PROPERTY.

WARRANTY.

See SALES, 9-17.

WASTE.

See MORTGAGES, 1.

WATERCOURSES.

1. **DIVERSION OF SURFACE WATER.** — A land-owner has no right to obstruct a natural watercourse on his land in which the surface water collecting thereon is accustomed to flow, and to construct ditches from it by means of which such water is discharged upon the lands of an adjoining owner, where it is not accustomed to flow, to his injury. *Rhoads v. Davidheiser*, 630.
2. **DRAINAGE — DIVERSION OF SURFACE WATER.** — An upper owner may improve and drain his land for agricultural purposes or the like, and in so doing, may increase the flow of surface water in the natural channel for it; but if he diverts it from such channel, and creates a new course, by which it is discharged upon the lower proprietor at another place, he must answer for the damages caused by the diversion. *Id.*
3. **THE COMMON-LAW DOCTRINE OF RIPARIAN RIGHTS** is inapplicable to the physical conditions of the Pacific states. *Reno Smelting Works v. Stevenson*, 364.

4. **THE RIGHT TO WATER IN THIS STATE MUST BE DETERMINED BY THE APPLICATION OF THE PRINCIPLE OF PRIOR APPROPRIATION**, and not by the common-law rules respecting riparian rights. *Id.*
5. **STATE HOLDS TITLE TO LANDS COVERED BY NAVIGABLE WATERS** to low-water mark, in its sovereign capacity, in trust for the people, for the purpose chiefly of protecting the rights of navigation. But the common right of the people in such lands is limited to what is of public use for the purposes of navigation and fishery; and the riparian owners are permitted to enjoy the remaining rights and privileges in the soil under water beyond their strict boundary lines, after conceding to the state all the public rights. *Miller v. Mendenhall*, 219.
6. **RIPARIAN OWNER MAY FILL IN AND MAKE IMPROVEMENTS IN SHALLOW WATER** in front of his land, out to the line of navigability; and such improvements are encouraged because they are in the general interest of navigation and commerce, and are a public as well as a private benefit. These riparian privileges are valuable property rights, the exercise of which, though subject to state regulation, can only be interfered with by the state for public purposes. *Id.*
7. **DOCK LINE, EFFECT OF ESTABLISHING, ON RIGHT OF RIPARIAN OWNER.** — The action of a state legislature in establishing a dock or harbor line is to be construed as a regulation of the exercise of the riparian right; it settles the line of navigability, above which the state will not interfere, and is an implied concession of the right to build, possess, and occupy to the established line, which amounts practically to a qualified possessory title. *Id.*
8. **GRANTS OF RIPARIAN RIGHTS WITHIN DOCK LINE, EFFECT OF.** — Where the owners of upland bordering on navigable waters, after the legislature has established a dock line, adopt a survey and plan of improvement for the use and occupation, up to the dock line, of the submerged land in front of their upland, they may possess, occupy, and improve the same themselves, in connection with the dry land, or they may grant to others the same rights within the dock line, and may, by appropriate covenants and stipulations in the deeds to their grantees, obligate them to respect and recognize the validity of such grants made in conformity with the general plan of improvement of the premises within the dock line, all the grantees thus becoming parties thereto; and a court of equity will not, in such a case, interpose in favor of a grantee of a portion of the upland to set aside prior deeds to sites in the submerged land. *Id.*

WILLS.

1. **VALIDITY OF WILL WRITTEN OR CANCELED IN LEAD PENCIL.** — A will wholly written in lead pencil is as valid as if written in ink; and the cancellation of legacies in lead pencil, though in a will written in ink, may be as final and conclusive as to the intent of the testator as if made in ink. *Estate of Tomlinson*, 637.
2. **CANCELLATION IN LEAD PENCIL**, of bequests in a will written in ink, and found in a place of safe deposit after the testator's death, is as final and binding as though made in ink, and cannot be regarded as deliberative merely, although a paper was also found in the testator's box in a bank, containing a list of the legatees as they were named in the will, with all the legacies canceled in pencil that were so canceled in the will, except one, in which the name was canceled, but not the amount. In such case, the paper found in bank will be presumed to be

the testator's deliberative memorandum, which he made final by the cancellation in the will. *Id.*

3. **REQUEST TO CHILDREN DOES NOT INCLUDE GRANDCHILDREN** or issue generally, except from necessity, which occurs when the will would remain inoperative unless the sense of the word "children" is extended beyond its natural import, or where the testator has clearly shown by other words that he did not intend to use the word "children" in its proper, actual meaning, but in a more extensive sense. *Estate of Hunt*, 640.
4. **CONSTRUCTION.** — Where there is a conflict between the literal meaning of a clause in a will or a codicil thereto as fully written out, and the language of a marginal note at its side, the language of the will must prevail. Thus where the word "children" is used in the will or codicil, the meaning of which is free from doubt, while the word "heirs" is used in the marginal note, the words of the will prevail, and grandchildren are excluded. *Id.*
5. **CONSTRUCTION.** — When, under a will, bequests are given to a certain class, but under a codicil thereto the bequests to that class are taken away, and another class substituted, the provisions of the codicil must prevail. The class named in the will take nothing, and the class named in the codicil take everything. *Id.*
6. **CONSTRUCTION OF.** — **A LIFE ESTATE ONLY**, and not an estate in fee, is given to a widow by the following clause in her husband's will: "I give and bequeath to my beloved wife all my property, both real and personal, to have and to hold the same for her own use and benefit, and also to make such disposition of the same that she, in her judgment, may deem best, should it become necessary that a part or all should become necessary for the support of herself and W. G., who I desire should remain with her during her lifetime, and have such care and attention given him as he may need. After the death of my wife, I will and devise that any and all property remaining unused shall be given to said W. G., to have and to use for his own benefit, or to make such disposition of as may be deemed best for his interests." *Miller v. Potterfield*, 919.
7. **IN CONSTRUING A WILL**, we may, in addition to the words, look to the surrounding circumstances; as, for example, the situation of the parties, the ties which connect the testator with the objects of his bounty, and the motives which appeared to influence him in disposing of his property *Id.*
8. **CONSTRUCTION OF.** — **A GIFT OF WHAT REMAINS UNDISPOSED OF** may often be repugnant to the first gift, or too nearly so to vest a certain right; nevertheless, a gift is good of what shall remain at the death of the first taker, if the latter has only a life estate given, or if such gift is preceded by a power of disposition so restrained in its exercise that a gift of what is left evidently refers to what shall remain unappropriated and unappointed under the power. *Id.*
9. **CONSTRUCTION OF.** — **WHENEVER A POWER OF DISPOSAL ACCOMPANIES** a bequest or a devise of a life estate, whether such estate be given expressly or by implication, the power is limited to such disposition as a tenant for life can make, unless there are other words clearly indicating that a larger power was intended. *Id.*
10. **EXECUTIONS — CONDITION THAT LEGACY SHALL BE EXEMPT.** — A legacy bequeathed by a testator upon the express condition that while in the hands of his executor it shall not be liable for the debts of the legatee,

but shall be paid directly to him by the former, without diminution, is valid, and not subject to execution by the judgment creditor of the legatee while in the hands of the executor. *Estate of Beck*, 623.

11. PAROL EVIDENCE IS NOT ADMISSIBLE TO PROVE THAT A TESTATOR INTENDED to devise a different lot from that described in his will, and that his intention was not correctly expressed in the will, owing to a misapprehension of the draughtsman as to the lot intended to be described. *Whrman v. Hoskins*, 297.

WITNESSES.

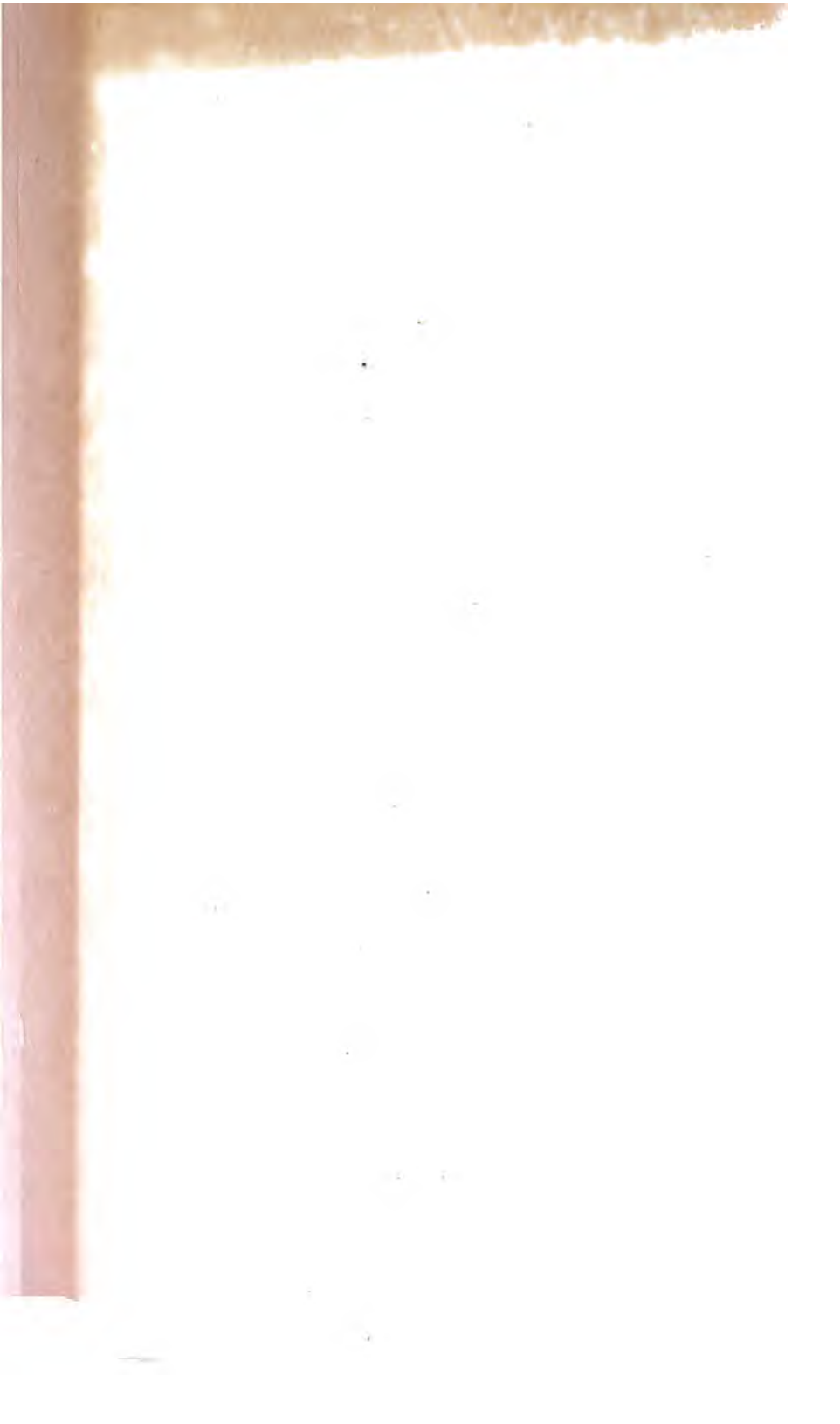
1. WITNESS IS COMPETENT TO TESTIFY to a fact of the truth of which he says he feels reasonably certain. *Boyer v. Teague*, 547.
2. PROOF OF FRAUD. — Plaintiff who puts defendant on the stand for the express purpose of showing his fraud does not thereby give him credit for honesty. His testimony is to be judged according to its merits, and creates no estoppel. *Webber v. Jackson*, 165.
3. IMPROVEMENT OF. — When a witness denies or fails to remember that on former occasions he made statements inconsistent with his testimony on the trial, evidence that he did make such statements is admissible to impeach him, upon the establishment of a proper and sufficient predicate. *Levy v. State*, 826.
4. WITNESS CANNOT BE DISCREDITED BY PROVING THAT HE WAS OFFERED some bribe or other inducement, not accepted by him, to testify in the case, as that being accused, with others, of the commission of a crime, that he was promised protection and immunity from punishment if he would tell all he knew about it, and that he did not accept this offer, though at a subsequent time and at another place, and in the presence of other persons, he made a full confession of the crime, and afterwards testified in court against his accomplices, and in accordance with his confession. *Owenham v. State*, 310.

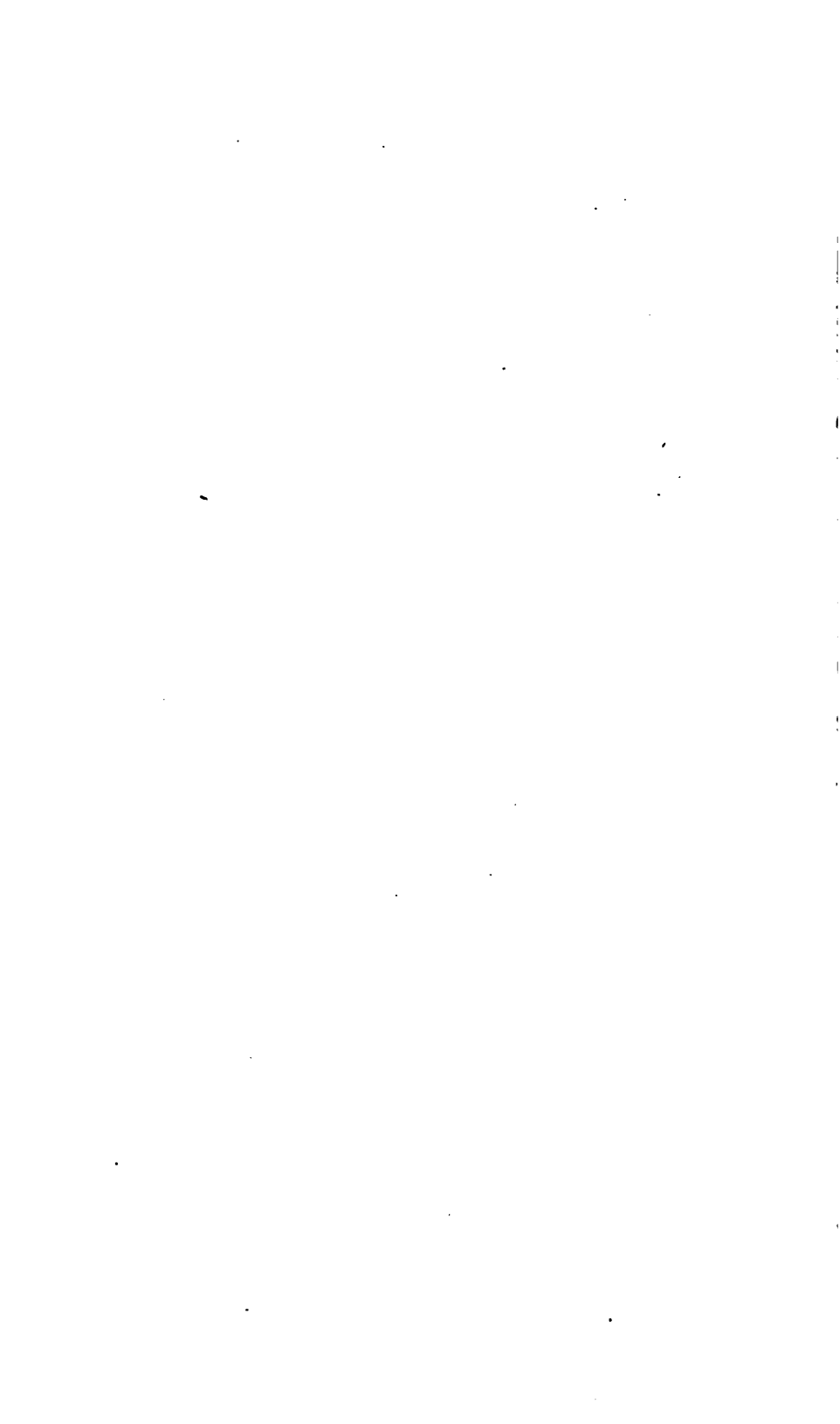
See DEPOSITIONS; EVIDENCE.

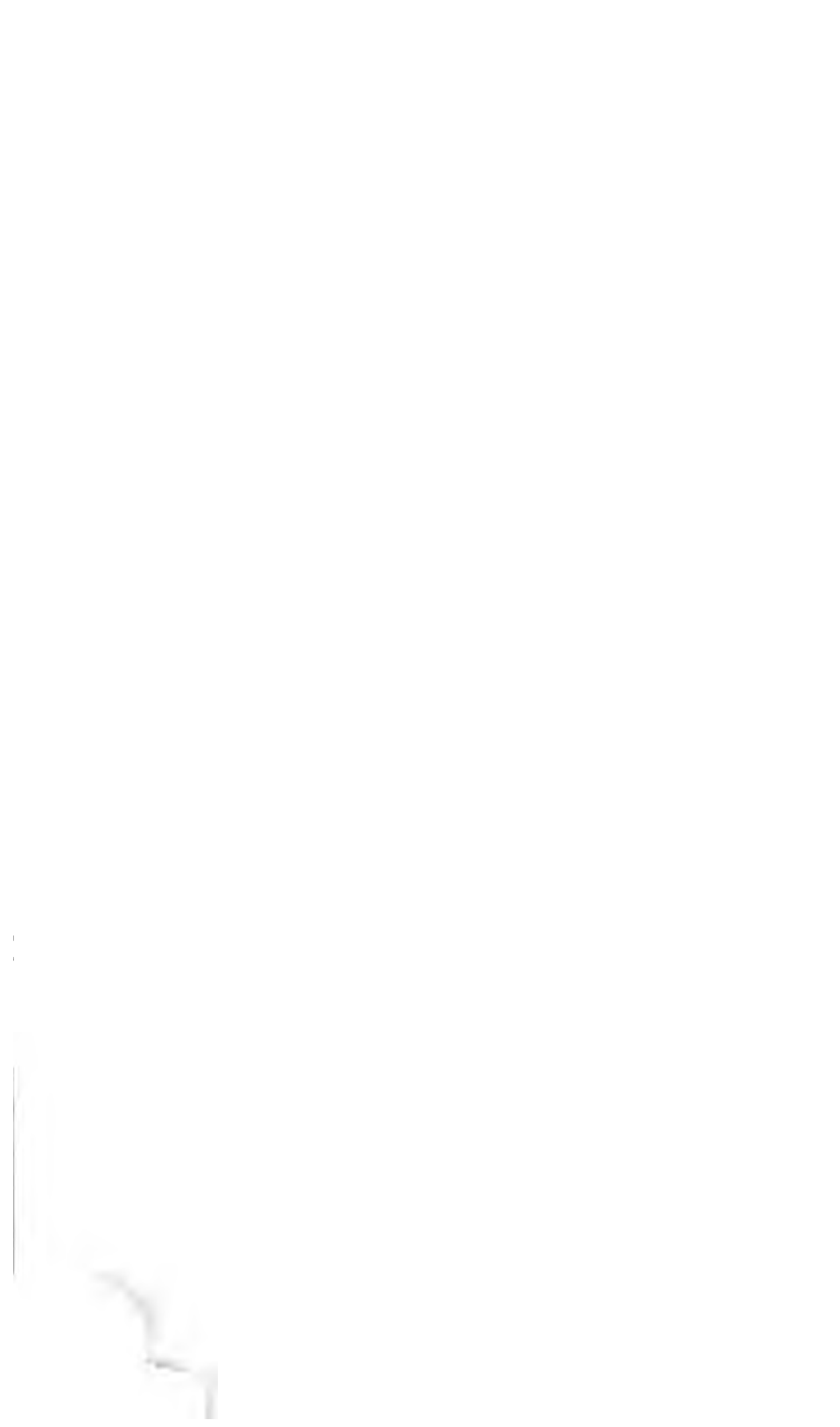


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